85-1157

No.

Supreme Court, U.S.
FILED
DEC 31 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1985

HILLTOP REALTY, INC.,
Petitioner,

vs.

CITY OF CLEVELAND HEIGHTS and
HEIGHTS COMMUNITY CONGRESS,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

ANTHONY J. DIVENERE, *Counsel of Record*
BURKE, HABER & BERICK CO., L.P.A.
300 National City Bank Building
629 Euclid Avenue
Cleveland, Ohio 44114
(216) 771-2700

RICHARD A. DEAN
ARTER & HADDEN
1100 Huntington Building
Cleveland, Ohio 44115
(216) 696-1100
Counsel for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTIONS PRESENTED

1. Whether the elements of standing for a city and an organization to bring claims under the Fair Housing Act are established by:

(a) the expenditure of funds by the city and the organization to determine if the defendant is violating the Fair Housing Act; or

(b) a vague threat of generalized harm in a large geographic area; or

(c) a hypothetical threat of resegregation in the school district.

2. Whether the district court's application of the continuing violation theory to unrelated incidents improperly permitted the consideration of events that occurred more than 180 days before the filing of plaintiffs' complaint.

3. Whether steering as defined and applied by the courts below violates the Fair Housing Act.

4. Whether the district court's interpretation of 42 U.S.C. §3604(a) as applied to petitioner violated petitioner's first amendment rights to commercial free speech by proscribing factual statements that did not directly result in the denial of housing.

PARTIES BELOW

The petitioner, Hilltop Realty, Inc., was the defendant-appellant before the Court of Appeals. Also named defendants in its Complaint were Vincent T. Aveni, John Mayfield, Val Vrana, Evelyn Gardner, Shirley Bernstein and Bruce Johanns. The district court dismissed all claims against all these individuals except Bruce Johanns. The Court of Appeals dismissed all claims against Bruce Johanns. Therefore, these individual defendants have no further interest in the outcome of the petition.

The respondents, City of Cleveland Heights and Heights Community Congress, were both plaintiff-appellees before the Court of Appeals.

TABLE OF CONTENTS

QUESTIONS PRESENTED I
PARTIES BELOW II
TABLE OF AUTHORITIES VI
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE WRIT 3

I. THE PLAINTIFFS FAILED TO ESTABLISH THE REQUISITE ELEMENTS OF STANDING UNDER ARTICLE III OF THE CONSTITUTION 3

A. The City Cannot Create Its Own Injury and Then Use Such Injury to Establish Standing 7

B. A Vague, Unproven Threat of Generalized Harm in a Large Geographic Area Is Not Sufficient to Establish Standing 8

C. The Hypothetical Threat of Resegregation in the School District Is Not Sufficient to Establish the City's Standing 10

D. The HCC's Expenditure of Funds for Monitoring Hilltop Is Not Sufficient to Establish Standing 10

E. The Federal Courts Cannot Be Used to Issue Advisory Opinions 11

II. THE DISTRICT COURT'S APPLICATION OF THE CONTINUING VIOLATION THEORY TO UNRELATED INCIDENTS IMPROPERLY PERMITTED THE CONSIDERATION OF EVENTS THAT OCCURRED MORE THAN 180 DAYS BEFORE THE FILING OF PLAINTIFFS' COMPLAINT 12

A. There Must Be a Related Practice of Illegal Conduct in Order for the Continuing Violation Theory to Apply 13

B. The District Court Improperly Applied the Continuing Violation Theory Without Finding a Related Practice of Illegal Conduct by the Defendants 15

III. STEERING AS DEFINED AND APPLIED BY THE COURTS BELOW DOES NOT VIOLATE THE FAIR HOUSING ACT 18

IV. THE DISTRICT COURT'S FINDINGS THAT CERTAIN STATEMENTS VIOLATED 42 U.S.C. §3604(a) ARE CONTRARY TO THIS COURT'S RULINGS GRANTING FIRST AMENDMENT PROTECTION TO FACTUAL COMMERCIAL SPEECH 20

A. The District Court Did Not Employ the Applicable Standard of Review for Proscribing Commercial Speech 20

1. The district court proscribed speech that was not false or misleading 21

2. Proscribing this speech does not further a substantial governmental interest, and, in fact, is contrary to the substantial governmental interest in the dissemination of consumer information 22

3. The district court's ruling did not properly determine whether a governmental interest was directly advanced by prohibiting the information which Hilltop disseminated 24

4. Lesser alternatives exist to further fair housing interests 25

B. The District Court's Definition of Steering Is Unconstitutionally Vague and Results in a Chilling Effect on Realtors 25

CONCLUSION 27

APPENDIX (under separate cover):

Opinion of the Court of Appeals for the Sixth Circuit (October 2, 1985) A1

Memorandum and Order of the United States District Court (July 2, 1985) A19

Memorandum and Order of the United States District Court (November 30, 1983) A49

Judgment Entry of the Court of Appeals for the Sixth Circuit (October 2, 1985) A207

Article III, Section 2, Clause 1, Constitution of the United States A209

First Amendment, Constitution of the United States A209

42 U.S.C. Section 3604, Fair Housing Act, Title VIII, Civil Rights Act of 1968 ..... A210

42 U.S.C. Section 3612, Fair Housing Act, Title VIII, Civil Rights Act of 1968 ..... A211

TABLE OF AUTHORITIES

Cases

Allen v. Wright, 468 U.S. ....., 82 L. Ed. 2d 556 (1984) 4, 5, 11

Brandenburg v. Ohio, 395 U.S. 444 (1969) 26

Casbah, Inc. v. Thone, 651 F.2d 551 (8th Cir. 1981), *cert. denied*, 455 U.S. 1005 (1982) 21

Central Hudson Gas & Electric Corp. v. Public Services Committee of New York, 447 U.S. 557 (1980) 20-21, 23, 24

Duke Power Company v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) 6

Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979) 5, 6, 8, 9, 10, 19

Gooding v. Wilson, 405 U.S. 518 (1972) 26

Gregory v. Chicago, 394 U.S. 111 (1969) 26

Hackett v. McGuire Bros., Inc., 445 F.2d 442 (3d Cir. 1971) 3

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) ..... *passim*

Hill v. AT&T Technologies, Inc., 731 F.2d 175 (4th Cir. 1984) 18

HOPE, Inc. v. County of DuPage, 738 F.2d 797 (7th Cir. 1984) 6, 11

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 17

Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977) 21, 23, 24, 25

Maryland v. Louisiana, 451 U.S. 725 (1981) 6

Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976) 5
Trafficant v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) 9
United Airlines v. Evans, 431 U.S. 533 (1977) 14, 17
United States v. L & H Land Corp., 407 F. Supp. 576 (S.D. Fla. 1976) 18
Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982) 4
Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, *reh'g denied*, 456 U.S. 950 (1982) 24
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) 20, 25
Warth v. Seldin, 422 U.S. 490 (1975) 4, 5
Zuch v. Hussey, 394 F. Supp. 1028 (E.D. Mich. 1975), *aff'd and remanded*, 547 F.2d 1168 (6th Cir. 1977) 19

Law Review Articles

Jackson and Matheson, *The Continuing Violation Theory and the Concept of Jurisdiction in Title VII Suits*, 67 GEO. L. J. 811 (1979) 13, 17
Note, *Continuing Violations of Title VII: A Suggested Approach*, 63 MINN L. REV. 119 (1978) 15
Note, *Title VII in the Continuing Violation Theory: A Return to Congressional Intent*, 47 FORDHAM L. REV. 894 (1979) 13

Constitution and Statutes

U.S. Const., Art. III, §2 ..... 1, 3, 5
U.S. Const., Amend. I ..... *passim*
42 U.S.C. §3604 ..... *passim*
42 U.S.C. §3612 ..... 1, 13

The petitioner Hilltop Realty, Inc. respectfully petitions for the issuance of a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this case on October 2, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 774 F.2d 135 and is reprinted at A1 of the Appendix to this Petition. The opinion of the United States District Court, dated November 30, 1983, is unreported and is reprinted at A49 of the Appendix.

JURISDICTION

The judgment sought to be reviewed by the petition was rendered and entered on October 2, 1985. This petition is filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, Section 2, Paragraph 1, Constitution of the United States.

First Amendment, Constitution of the United States.

42 U.S.C. Section 3604, Fair Housing Act, Title VIII, Civil Rights Act of 1968.

42 U.S.C. Section 3612, Fair Housing Act, Title VIII, Civil Rights Act of 1968.

(Text of above provisions are in Appendix, beginning at A209).

STATEMENT OF THE CASE

Hilltop Realty, Inc., now known as HGM/Hilltop Realty, Inc., ("Hilltop") is a licensed real estate brokerage firm with its principal office in Lyndhurst, Ohio, an eastern suburb of Cleveland. Plaintiff City of Cleveland Heights ("City") is a municipal corporation organized under the laws of the State of Ohio, with a population in 1980 of 56,438. The Heights Community Congress ("HCC") is an Ohio corporation not for profit composed of certain community groups and organizations operating in Cleveland Heights. One of the alleged objectives of the HCC is promoting Cleveland Heights as "an open and integrated community".

Respondents (along with a number of other individual plaintiffs whose claims were dismissed prior to trial) filed suit against Hilltop, its president, and five sales persons, alleging unlawful housing practices in violation of the Fair Housing Act, 42 U.S.C. §3604 and the Civil Rights Act of 1866, 42 U.S.C. §1982. The suit was based upon a program of monitoring compliance with fair housing laws by real estate firms operating in Cleveland Heights that the City and the HCC conducted from 1976 through 1978. The monitoring was conducted by means of "audits" or "checks" whereby black and white checkers posing as real home buyers would separately enter a real estate office or open house, ask to see homes and later report their observations of the conduct of the real estate sales person.

During this period, the respondents conducted 22 checks of Hilltop consisting of 44 contacts. Plaintiffs chose not to submit into evidence 11 of the 22 checks conducted of Hilltop. Plaintiffs introduced evidence of 11 checks at trial, consisting of 22 individual contacts.

The district court found that in six of the 22 individual contacts submitted into evidence, Hilltop salespersons violated 42 U.S.C. §3604(a). In addition, two Hilltop sales persons were held to have made statements that violated §3604(a) in two instances involving real home buyers purchasing in Cleveland Heights. The district court also found one violation of §3604(e) involving a solicitation. Of the eight violations of §3604(a) found by the district court, only one of them occurred within 180 days before the filing of plaintiffs' complaint. *See* District Court Memorandum and Order, filed November 30, 1983 and December 1, 1983 (hereinafter "MO".) (A49).

The Sixth Circuit Court of Appeals affirmed the district court's decision for the most part except that it reversed the district court as to the purported solicitation violation.

REASONS FOR GRANTING THE WRIT

I. THE PLAINTIFFS FAILED TO ESTABLISH THE REQUISITE ELEMENTS OF STANDING UNDER ARTICLE III OF THE CONSTITUTION.

The question of standing under the Constitution has been a perplexing question in fair housing cases. Some federal courts have interpreted standing in fair housing very liberally. *See, e.g., Hackett v. McGuire Bros., Inc.,* 445 F.2d 442 (3d Cir. 1971). This Court, however, recently has begun to set limits on standing in such cases. *See, e.g., Havens Realty Corp. v. Coleman,* 455 U.S. 363 (1982).[1]

1. These cases suggest that standing in fair housing cases should be limited to plaintiffs who have suffered distinct and palpable injuries through discrimination occuring within a compact neighborhood.

In *Warth v. Seldin,* 422 U.S. 490, 498 (1975) the Court explained the conflicting considerations in evaluating standing as follows:

> In essence, the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise . . . In both dimensions it is founded in concern about the proper—and properly limited—role of the courts in a democratic society. [citations omitted].

Standing to potential plaintiffs in particular has been denied because of the prohibition against the adjudication of generalized grievances and political or moral concerns not appropriately addressed by the courts. *Allen v. Wright,* 468 U.S. ....., 82 L. Ed. 2d 556, 569 (1984).

This court has held:

> [As an] irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision". [citations omitted].

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982).

In this case, plaintiffs failed to prove that they were injured in fact, or that any alleged injury was caused by the actions of Hilltop. Instead, they have shown only a most vague and abstract harm. Plaintiffs in effect requested the trial court to issue an advisory opinion that the defendant had violated the Fair Housing Act. However, plaintiffs utterly failed to prove how the particular violations injured them in the past or could injure them

in the future. *See e.g.* Memorandum and Order of the Court of July 1, 1985, at p. 36 granting attorney fees on the basis of plaintiffs' "moral" victory (A19). Plaintiffs also failed to demonstrate how such a vague and abstract injury could be redressed by a favorable decision.

This case presents the classic dilemma of standing in fair housing actions; while Congress intended standing to be construed liberally, the courts cannot be called upon to issue advisory opinions which merely serve to validate social policies rather than to adjudicate real controversies. *See Allen v. Wright,* 468 U.S. ....., 82 L. Ed. 2d 556, 569 (1984). This case offers the court the opportunity to resolve this dilemma by defining clear limits of standing in fair housing cases. Indeed, the case at bar is specifically the kind of case that the threshold requirement of standing should eliminate. In the absence of some degree of reasonable proof at trial of an actual injury to plaintiffs at the hands of Hilltop, the district court should have dismissed the suit. *Accord Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 115, n.31 (1979).

The district court, however, erroneously held that plaintiffs did not have to prove at trial the allegations to to support standing[2] (MO at 194, n.105; A196). The court

---

2. The district court further erred in suggesting that in general, the criteria for determining standing is less stringent when the relief being considered is injunctive or declaratory relief rather than money damages (MO at 202; A202). The standing requirement of Article III, as interpreted in 200 years of judicial history, makes no distinction between standing for monetary damages and standing for injunctive or declaratory relief. No court has ever made such distinction.

Many, if not most, fair housing cases involve requests for injunctive and declaratory relief, often in addition to compensatory damages, yet this court has applied the same test of standing to those claims as is applicable to claims involving solely monetary damages. *Cf. Warth v. Seldin,* 422 U.S. 490, 496 (1975); *Simon v. Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26, 34 (1976).

of appeals, in affirming this portion of the district court's decision, similarly held that plaintiffs need only prove at trial that they were theoretically in a position to be injured. *Heights Community Congress v. Hilltop Realty, Inc.*, 774 F.2d 135, 139 (6th Cir. 1985) (A1, 6-7). Such a conclusion is clearly contrary to well-established law.

In *Gladstone* for instance, this court emphasized that the allegations relating to standing remain to be proved at trial. The court stated:

> Although standing is a matter generally dealt with at the earliest stages of litigation, usually on the pleadings, it sometimes remains to be seen whether the factual allegations of the Complaint necessary for standing will be supported adequately by the evidence adduced at trial.

Id. at 115, n.31. *See also Duke Power Company v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) (court did not limit its examination of the standing question to the allegations of plaintiff's complaint, but rather reviewed the evidence presented at trial), *Maryland v. Louisiana*, 451 U.S. 725 (1981) (court reviewed the findings of the Special Master in determining standing). *HOPE, Inc. v. County of DuPage, Illinois*, 738 F.2d 797, 808 (7th Cir. 1984). ("While the elements of standing must initially be sufficiently alleged in the pleadings, they must also be established through the introduction of evidence in order to obtain any judicial relief.")

While the district court erroneously held to the contrary position, it did present an alternative ground upon which to base standing, i.e., that the record provides facts which are sufficient to support plaintiffs' pretrial allegations of actual and threatened injury (MO at 194, n.105; A196).

The district court pointed to several instances of harm allegedly sustained by the City which purportedly gave it standing (MO at 194-201; A195-201). In the case of the City, these purported injuries were (1) the expenditure of City funds for housing programs, (2) the threatened "resegregation" of Cleveland Heights, (3) the threatened diminishment of the City's tax base and (4) actions taken by the school district to offset disproportionate black enrollment in certain schools. In the case of the HCC, the injury was the expenditure of HCC funds in monitoring real estate companies, in particular, Hilltop. However, there was no evidence that any of these supposed effects, if they occurred at all, constituted actual or threatened injury traceable to the actions of Hilltop.

A. The City Cannot Create Its Own Injury and Then Use Such Injury to Establish Standing

As to the City, the district court argued that the City had voluntarily expended its funds to fight what it perceived and feared to be illegal real estate practices. The court in effect concluded that the voluntary expenditure of funds by the City to investigate fair housing actions constituted a distinct and palpable injury giving, conferring it standing to sue whomever it was investigating (MO at 197; A198).

Such a finding is obviously circuitous, since it would enable any government unit or organization to investigate any misconduct it suspected by anyone, then use the investigation as the "injury" allegedly inflicted by such a defendant. Such a position is without precedent. The injury required by the Constitution must be independent of the injury which the City itself created in order for a justiciable controversy to exist.

B. A Vague, Unproven Threat of Generalized Harm in a Large Geographic Area Is Not Sufficient to Establish Standing

The district court found that the City could suffer an injury as a result of the threat of resegregation (MO at 197-98; A198-99). However, the district court failed to find any facts which proved that such a threat was posed by the acts of Hilltop. This Court in *Bellwood* held that a city might claim a cognizable injury if "perceptible increases in minority population *directly* attributed to the racial steering [by the defendants] precipitate an exodus of white residents." 441 U.S. at 110 (emphasis added). However, the district court again erred as a matter of law. While a threatened injury, if direct, can give rise to standing, no such direct threat existed here due to the actions of Hilltop.[3]

During the time period for which violations against Hilltop were charged (1976-1980) the City of Cleveland Heights was not losing its racial stability. Indeed, the evidence in the record shows that during the period the City was a model of stability and racial integration. From 1977 to 1980, the average annual increase in black popula-

---

3. This court also held that a significant reduction in property values during the period of the alleged acts of discrimination may constitute an injury sufficient for standing. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 110-11 (1979). The district court found that threatened "forces of resegregation if allowed to proceed unchecked, would probably cause diminishment of the City's tax base as recognized in *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 110-11 (1979)." (MO at 197-98; A198-99).

However, at trial, there was no showing that there was any probability of reduction of the City's tax base. Indeed, the evidence of the City demonstrated that property values in Cleveland Heights showed a substantial increase during the period in question which, in fact, exceeded the increases in every neighboring suburb but one (MO at 198, n.107; A198-99).

tion was only .3%. The percentage of black population in Cleveland Heights (24.9%) as shown by the 1980 census was almost precisely the same as the county-wide black percentage of 24.6% (*See* MO at 6; A53). The City can hardly claim injury due to segregation produced by Hilltop's action when its racial composition is virtually identical to that of the county as a whole. Indeed, it would be more logical to infer that the actions of all real estate agents in Cleveland Heights, taken in aggregate, were actually benefiting the City since the City seems to have, during the period of alleged injury, achieved a remarkable level of integration and stability.

In the instant case, moreover, the City's claim of injury affecting a vast city-wide area with a population of almost 60,000 people is too tenuous and vague to support standing. *Cf., Gladstone Realtors v. Village of Bellwood,* 441 U.S. at 114 (1979) (only a 12 x 13 square block neighborhood affected); *Trafficant v. Metropolitan Life Ins. Co.,* 409 U.S. 205 (1972) (only one apartment complex affected), *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 376-378 (1982) (allegations that a single act of discrimination injured resident plaintiffs throughout the Richmond, Virginia area were implausible as a basis to establish standing). Especially in view of the fact that what testimony was produced came primarily from checkers, any injury allegedly suffered by the residents of the City was clearly hypothetical at best. Such a hypothetical injury, if it is recognizable at all, is clearly not subject to redressability by the courts.

C. The Hypothetical Threat of Segregation in the School District Is Not Sufficient to Establish the City's Standing

In a final attempt to find some basis for standing of the City, the district court cited the *Bellwood* reference to school segregation as a possible injury caused by racial steering (MO at 198-99; A199). The district court found that the Cleveland Heights-University Heights School District had taken certain actions to offset increases in the black enrollment in certain elementary schools. However, it is undisputed that the school district is a governmental entity completely distinct from the City of Cleveland Heights and that actions taken by the school district had no effect upon the City government. Moreover, there was no evidence of any kind that the increase in black enrollment or that any expenditures by the school district were in any way caused by the acts of Hilltop or that the Court could take any actions to redress the injury, if it had occurred.

D. The HCC's Expenditure of Funds to Monitor Hilltop Is Not Sufficient to Establish Standing

In *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 365 (1982), this Court held that any plaintiff, including presumably a community organization, was required to prove at trial the requisite facts needed to show standing. The Court required the organization to prove both injury to itself and a causal relationship between the alleged violations and the alleged injury.

In this case, the district court found that the HCC had conducted monitoring of real estate firms to determine compliance with fair housing laws and had expended

funds to finance such activities (MO at 201-02; A202). However, the district court erroneously determined that such monitoring, in and of itself, was sufficient to establish standing in a fair housing case (MO at 201-02; A202). As with the City, the HCC cannot create the injury upon which it bases standing. See Part II A *supra*. The HCC cannot rely on the remote possibility that the actions of defendants might make its activities more difficult. In *HOPE, Inc. v. County of DuPage, Illinois*, 738 F.2d 797 (7th Cir. 1984).

Indeed, there was no evidence that the conduct of Hilltop perceptibly impaired the HCC's ability to carry out its activities, as was suggested to justify standing in *Havens*. The fact that the HCC voluntarily engaged in the monitoring of Hilltop real estate practices in no way shows a bona fide injury to HCC. The district court acknowledged the HCC's lack of proof of injury caused by Hilltop. "Rather, the fault lies in HCC's failure to produce evidence that causally connects Hilltop's section 3604 violations to HCC's expenditure of monies . . . ." (MO at 200-02; A200-01). Inexplicably however, the court still found that the HCC had standing. Such a holding is clearly in error.

E. The Federal Courts Cannot Be Used to Issue Advisory Opinions

Limitations on standing are central to the constitutional limits on the courts' powers. As this Court stated in *Allen v. Wright*, 468 U.S. ....., 82 L. Ed. 2d 556, 567 "Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition of a litigant's raising another person's grievances more appropriately addressed in the legislative branches . . .".

Perhaps, nowhere more than fair housing has the definition of standing been more difficult. By its nature,

fair housing cases often involve institutional plaintiffs and defendants, diffuse, vague and prospective injuries, and difficult-to-trace causation. Nevertheless, the federal courts cannot be used to prospectively define the housing demographics of a community by issuing prophylactic orders against any party who is in a position to influence such demographics. Such concerns are utterly beyond the courts' powers to redress. The federal courts' role is to adjudicate true controversies between adversarial parties when harm has occurred or is imminently threatened.

In the instant case, rather than adjudicating a true controversy, the district court has issued an advisory opinion finding certain technical violations by Hilltop. Such an action by the district court is clearly outside of the judicial function as defined by the Constitution.

II. THE DISTRICT COURT'S APPLICATION OF THE CONTINUING VIOLATION THEORY TO UNRELATED INCIDENTS IMPROPERLY PERMITTED THE CONSIDERATION OF EVENTS THAT OCCURRED MORE THAN 180 DAYS BEFORE THE FILING OF PLAINTIFFS' COMPLAINT.

The continuing violation theory is an exception to statutes of limitations that has frequently been applied by the courts in civil rights cases. The theory allows the trial court to consider allegedly improper acts that occurred prior to the limitations date because those acts are said to be part of some larger violation that continued into the limitation period.

Problems have arisen in the application of this concept. Commentators have noted confusion on the parts of the lower courts who have rendered "inconsistent and often

irreconcilable decisions." Jackson and Matheson, *The Continuing Violation Theory and the Concept of Jurisdiction in Title VII Suits,* 67 GEO. L. J. 811, 812 (1979). Greatly increased judicial use of the continuing violation theory has been discerned; however, this increased use has been attended with considerable confusion and inconsistency. Note, *Title VII and the Continuing Violation Theory: A Return to Congressional Intent,* 47 FORDHAM L. REV. 894, 899 (1979). The instant case is a prime example of a trial court applying this confusing doctrine in such an unlimited manner that the statutory limitations period becomes absolutely meaningless.

A. There Must Be a Related Practice of Illegal Conduct in Order for the Continuing Violation Theory to Apply

The statutory provision under which the plaintiffs sought relief, 42 U.S.C. §3612(a), contains a 180-day statute of limitations. The district court permitted the plaintiffs to prove acts allegedly in violation of the Fair Housing Act that occurred as early as August 26, 1976 despite the fact that the Complaint was not filed until March 7, 1979, nearly three years later.[4] The Court of Appeals for the Sixth Circuit then compounded this error by ruling that the issue was simply a question of fact on which the district court had not committed clear error. 774 F.2d at 141 (A8-9).

This Court considered the continuing violation theory in the context of Title VIII in *Havens Realty Corp. v. Coleman,* 455 U.S. 363 (1982). In *Havens* four plaintiffs brought

---

4. Although not the subject of any violation finding, evidence of events occurring as early as 1974 was permitted by the district court as bearing on so-called "corporate intent." (MO at 131-35; A148-51).

suit against a real estate broker of rental apartments and one of its employees alleging racial steering and discrimination in the rental of housing. The Court held that the claims of one plaintiff alleging that the defendants provided false housing information on four separate occasions prior to the 180-day period were barred by the statute of limitations. However, the Court refused to dismiss certain other claims, holding that, where plaintiffs challenged not just one incident of conduct violative of the Fair Housing Act but "an unlawful practice that continued into the limitations period", the complaint is timely if it is filed within 180 days of the last violation. *Havens Realty Corp.*, 455 U.S. at 381.[5] Thus the *Havens* court recognized that the continuing violation theory is limited in application to those cases where the plaintiff challenges a practice of violations.

The "practice" element that distinguished which pre-limitations violations could be proven in *Havens* is essential if the statutory time limits are to retain meaning. Requiring that a practice of related violations be proven fulfills the condition of a present violation that this Court established in *United Airlines v. Evans*, 431 U.S. 533 (1977).[6] An expansive application of the continuing violation theory could eviscerate entirely the Congressional policies that underlie the 180-day limitation period. By requiring that plaintiffs prove a related practice of violations before ex-

---

5. The *Havens Realty* case reached this Court by virtue of a Court of Appeals' reversal of a motion to dismiss. Thus, the plaintiffs' allegations of an illegal practice were sufficient, and they were not required to prove their allegations.

6. Although *Evans* was a Title VII case, there is no reason to distinguish the Title VIII statute of limitations in this regard. Indeed, if anything, plaintiffs herein, as organizational plaintiffs with large monetary and personnel resources, should be better able to comply with strict statutory limitations than the individual plaintiffs upon whom enforcement of Title VII falls for the most part.

panding the time frame to be examined helps to obviate these concerns. *Note, Continuing Violations of Title VII: A Suggested Approach*, 63 MINN. L. REV. 119, 144-145 (1978). There can be no continuing violation where the incidents are unrelated.

B. The District Court Improperly Applied the Continuing Violation Theory Without Finding a Related Practice of Illegal Conduct by the Defendants

The district court found eight violations of §3604(a). Seven of these violations occurred prior to the 180-day limitation period; only one violation took place during the limitation period.[7] Rather than analyzing whether the incidents were related and formed a practice extending into the limitation period, the district court simply assumed that it could consider any alleged violations as long as one of them occurred within 180 days of the filing of the complaint. In the view of the district court:

> Of the eight section 3604(a) violations, one . . . occurred within the 180-day period prior to the filing of plaintiffs' complaint. As in *Havens*, 455 U.S. at 381, if "at least one" of the eight incidents "occurred within the 180-day period", then "the unlawful practice . . . continue[d] into the limitations period." Therefore, the "complaint is timely", and each of the incidents is rendered timely.

(MO at 188; A191). The court never analyzed whether a practice existed, but rather assumed that one timely occurrence automatically rendered every other occurrence timely, whether those occurrences were related or not.

---

7. One of the pre-limitation violations of §3604(a) also constituted a violation of §3604(c).

Had the district court considered whether a practice of illegal conduct existed, it would not have concluded as it did that the continuing violation theory was applicable. It is clear from this Court's opinion in *Havens* that if violations are not related, the continuing violation theory does not apply. In *Havens* this Court held that the claims of one of the tester plaintiffs were time-barred, because the four instances in which she allegedly received false information constituted "isolated occasions". These incidents were not related to the steering incidents that occurred within the limitations period, and therefore the continuing violation theory was inapplicable. 455 U.S. at 381.

In *Havens* this Court did apply the continuing violation theory to some of the plaintiffs' claims, i.e., those that formed "an unlawful practice that continued into the limitations period". The violations to which the theory was applied were alleged to be "a continuing pattern, practice and policy of unlawful racial steering". The acts were very similar in nature (steering of blacks away from an apartment complex owned by one defendant and into an integrated complex also owned by the same defendant), involved one very specific location and occurred within a four month period.

In contrast to the *Havens* situation, the case at bar presents pre-limitations incidents that are unrelated to the single violation that occurred within 180 days of the filing of the complaint. Of the seven pre-limitation violations found by the district court, six incidents involved steering. The single post-limitation violation was not a steering incident, but rather involved a failure to serve. Although there was one pre-limitation failure to serve, it occurred nearly a year and one-half before the post-

limitation failure to serve, involved a different real estate agent and was totally unrelated to the failure to serve that occurred within the limitations period. Moreover, the one incident that took place within the limitations period involved a realtor, who was not involved in any way with the seven pre-limitations violations. Conversely, none of the agents who participated in pre-limitation violations had any part in the one post-limitation violation.

In determining when there is sufficient continuity between the violations to constitute a practice as required by *Havens,* it is relevant to examine the so-called "pattern or practice" cases, which are closely analogous to continuing violations. Jackson and Matheson, *supra,* at 835. The underlying rationale for the continuing violation theory is that the "pattern or practice" is a present violation (as required by this Court in *United Airlines v. Evans,* 431 U.S. 533 (1977)) because it stretches into the limitations period, even though some specific incidents occurred pursuant to the practice more than 180 days before the complaint was filed.

The leading pattern or practice case in the Title VII area is *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977) in which this Court stated:

> Because it alleged a systemwide pattern or practice of resistence to the full enjoyment of Title VII rights, the Government ultimately had to prove more than the mere occurrence of isolated or "accidental" or sporadic discriminatory acts. It had to establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice.

Id. at 336. Lower courts that have considered Title VIII pattern or practice actions have come to similar conclusions.

E.g., United States v. L & H Land Corp., 407 F. Supp. 576 (S.D. Fla. 1976) (holding that no pattern or practice occurs if the discriminatory conduct of the defendant was an isolated, accidental or peculiar departure from an otherwise non-discriminatory norm). *Id.* at 580.

In the instant case, there was no proof of, nor did the district court require proof of, a discriminatory norm. In fact, the evidence adduced at trial showed that in most instances presented by the plaintiffs, there was no violation of the Fair Housing Act. The district court specifically found that, with respect to seventeen alleged violations, there was no steering into or away from Cleveland Heights. Moreover, defendants presented significant evidence that showed that the norm was non-discrimination.

Allegation of a continuing violation does not constitute "a talismanic or shibboleth term automatically relieving a claimant of any obligation to comply with the statutory time requirement" for the filing of a complaint. *Hill v. AT&T Technologies, Inc.*, 731 F.2d 175, 179-80 (4th Cir. 1984) (Title VII case). Only by requiring strict adherence to the *Havens* requirement that there be a related practice of illegal conduct before the continuing violation theory applies can the courts avoid having the limitations rule being swallowed by the continuing violation exception. Petitioner requests this Court to clarify the essential elements for application of the continuing violation theory.

III. STEERING AS DEFINED AND APPLIED BY THE COURTS BELOW DOES NOT VIOLATE THE FAIR HOUSING ACT.

The district court found six incidents of so-called "steering" and, on that basis and without further analysis,

ruled that the defendants had violated 42 U.S.C. §3604(a). Such a holding is improper, because steering is not a statutory violation *per se* and may be illegal only if defendants have acted so as to make unavailable or deny dwellings to individuals because of race.

The district court adopted and applied the following definition of steering:

> The use of a word or phrase or action by a real estate broker or salesperson which is *intended* to influence the choice of a prospective property buyer on a racial basis. (Emphasis in original).

(MO at 26; A68). This definition was taken directly from the decision of another district court in *Zuch v. Hussey*, 394 F. Supp. 1028, 1047 (E.D. Mich. 1975), *aff'd and remanded*, 547 F.2d 1168 (6th Cir. 1977). The *Zuch* court applied the steering label to the conduct of real estate agents who, by means of racially derogatory remarks about an integrated area of Detroit, strongly discouraged white home buyers from purchasing homes in that area. The *Zuch* court then concluded that steering is a violation of 42 U.S.C. §3604(a) as a matter of law. *Id.* at 1048. Although this Court has specifically declined to rule whether steering, as defined by *Zuch*, is illegal, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, n.7 (1982); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 115, n.32 (1979), lower courts have unquestioningly applied *Zuch* and held that steering is a *per se* violation of the Fair Housing Act.

Clearly, however, there can be no violation of §3604(a) unless housing was made unavailable or denied on the basis of race. The district court in the present case analyzed the incidents as to which evidence was presented, found that those incidents constituted steering as defined by *Zuch*, and without any further analysis, ruled that the

incidents were statutory violations. Without any proof that housing was made unavailable or denied, such a holding is plainly in error.

The court of appeals affirmed the district court on this issue, holding that a statement or act that would have a discriminatory effect and was made with an intent to steer would violate §3604(a). 774 F.2d at 140 (A8). Such a holding rewrites the statute. This function is best left to Congress.

IV. THE DISTRICT COURT'S FINDINGS THAT CERTAIN STATEMENTS VIOLATED 42 U.S.C. §3604(a) ARE CONTRARY TO THIS COURT'S RULINGS GRANTING FIRST AMENDMENT PROTECTION TO FACTUAL COMMERCIAL SPEECH.

A. The District Court Did Not Employ the Applicable Standards of Review for Proscribing Commercial Speech

The standards applied by the district court to determine whether certain oral statements made by petitioner's sales associates constituted steering allegedly proscribed by §3604(a) violated petitioner's first amendment rights to commercial speech. This Court has never determined what statements constitute steering. Nor has this Court determined that steering violates any provision of the Fair Housing Act (See Part III, *supra*).

The statements proscribed by the district court constitute commercial speech which is to be afforded first amendment protection. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). Proscription of commercial speech contravenes the first amendment absent a showing of each of the criteria of *Cen-*

tral Hudson Gas & Electric Corp. v. Public Services Committee of New York, 447 U.S. 557 (1980):

1. The proscribed speech is not false or misleading;
2. The state demonstrates a substantial state interest in proscribing the speech;
3. The statute directly advances the substantial government interest; and
4. There are no lesser alternatives which could likewise further the substantial interest.

In determining what statements constitute steering, the district court disregarded the *Central Hudson* four-part test. As a result, the district court's findings that such statements constitute unlawful steering violate the first amendment rights of petitioner.

1. The district court proscribed speech that was not false or misleading

Because the commercial speech of Hilltop was not false or misleading, it must be given first amendment protection. *Central Hudson Gas,* 447 U.S. 557; *Linmark Associates, Inc., v. Willingboro,* 431 U.S. 85, 91 (1977). Commercial speech is considered illegal only if it is employed to promote the purchase of illegal items or investment in illegal activities. *Casbah, Inc. v. Thone,* 651 F.2d 551 (8th Cir. 1981), *cert. denied* 455 U.S. 1005 (1982). The purpose for which these statements were made was to sell homes, obviously not an illegal purpose.

Moreover, these statements were not misleading, but rather were statements of true facts and occurrences. The district court noted six statements of fact which it found to be violations of §3604(a):

1. A statement that a white couple was lucky "because they would get a better deal" on homes in a neighborhood since they were white (MO at 37; A77).

2. A statement concerning the location "of the houses [in the neighborhood] where the white people lived and where black people lived." (MO at 36; A76).

3. The description of one neighborhood as being undesirable because "even blacks were hesitant to buy in the neighborhood" though it was predominantly black (MO at 39; A78).

4. A statement that "some white home buyers are buying [in East Cleveland] for the lower prices." (MO at 50; A87).

5. The question asked of a buyer "whether he was aware that the Forest Hills area was more than half ack." (MO at 99; A124).

6. A question asked of a white buyer of "how do you feel about black specifically." (MO at 103; A127).

In addition, the district court found that one statement of fact indicated an intent to steer when a buyer was told "that the children of a black family that had moved into Lyndhurst were beaten up in the high school and that the family had to move." (MO at 109; A132). None of these statements was found to be false or misleading by the district court, or in any way denied purchasers the opportunity to purchase homes in the areas in question. Therefore, this speech was subject to first amendment protection.

2. Proscribing this speech does not further a substantial governmental interest, and in fact, is contrary to the substantial governmental interest in the dissemination of consumer information

Nowhere in its opinion did the district court identify any substantial governmental interest to be served by proscribing the factual information that Hilltop sales

associates gave to customers. By failing to identify the governmental interest, it was impossible for the district court to determine whether an interest was directly advanced by proscribing the statements made by Hilltop agents.

Moreover, proscription of this information actually hindered the governmental interest in disseminating consumer information. Consumers have a right to know as much information as possible about the products or services which they desire to purchase:

> The protection afforded (by the first amendment) is to the communication, to its source and to its recipients both. Because of this consumers' right to commercial speech, even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some information is better than no information at all.

Central Hudson Gas, 447 at 562. This is particularly true when the important and expensive purchase of a home is at stake:

> [I]nformation, which pertains to sales activity in [the city], is a vital interest to [city] residents, since it may bear on one of the most important decisions they have a right to make: where to live and raise their families.

Linmark Associates, Inc., 431 U.S. at 96-97. The proscribed information in this case concerned the economic and social attractiveness of neighborhoods, the strengths or weaknesses of schools and the bargaining position of the buyers, all of which is important consumer information. Therefore, the proscription of factual information in this case without a determination of what governmental interest would be advanced by such proscription violates the first amendment.

3. The district court's ruling did not properly determine whether a governmental interest was directly advanced by prohibiting the information which Hilltop disseminated

By ruling that information which "tended to influence" consumers could be censored (MO at 112; A134), the district court ignored the *Central Hudson Gas* requirement that a prohibition directly advance the government's interest. As stated in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496, *reh'g denied*, 456 U.S. 950 (1982), commercial speech cannot be limited unless it is "expressly directed" toward acts contrary to substantial governmental interests. By requiring merely a showing that the statements would "tend" to influence, the court applied a much lesser standard than the "direct" standard in *Central Hudson Gas* and *Hoffman*.

Moreover, "[a]fter *Virignia Pharmacy Board* it is clear that commercial speech cannot be banished because of an *unsubstantiated belief* that its impact is 'detrimental' ". (emphasis added). *Linmark Associates, Inc.*, 431 U.S. at 92, n.6. The district court found that "the statistical evidence presented in this case is not sufficient to permit a finding of 'significant discriminatory effect' " (MO at 27; A68). Since the district court's broad brush definition of steering did not directly advance any substantial governmental interest, it violated petitioner's first amendment rights to commercial speech.

In the specific case of housing information, this Court has admonished against such a broad brush interpretation:

> The [City] has sought to restrict the free flow of this data because it fears that otherwise homeowners will make decisions inimicable to what the [city] views as the homeowner's self-interest and the corporate

> interest of the township: they would choose to leave town. . . . If dissemination of this information can be restrictive, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that the disclosure would cause the recipients of the information to act "irrationally". *Virginia Pharmacy Board* denies government such sweeping powers.

Id. at 96-7. Thus, the "tendency" standard of the district court violated the first amendment requirement of a direct relationship between the government interest and the proscription of speech.

4. Lesser alternatives exist to further fair housing interests

Lesser alternatives exist to proscribing truthful and otherwise not unlawful statements under the guise of steering. The substantial interest in prohibiting housing discrimination can still be served if limited to the dissemination of false or misleading speech which directly results in denying housing or making housing unavailable to prospective purchasers. Such a limitation would still allow the government to prevent discriminatory statements as defined in §3604(c) and (d); *e.g.*, statements indicating a racial preference or untrue statements that homes are unavailable. Such a limitation would further the interests of preventing housing discrimination, without censoring the dissemination of factual information protected by the first amendment.

B. The District Court's Definition of Steering Is Unconstitutionally Vague and Results in a Chilling Effect on Realtors

The definition of steering employed by the district court results in an unconstitutionally vague interpretation

of what is prohibited under §3604(a), which in turn has a chilling effect on the dissemination of information to potential home purchasers. As this Court stated in *Gooding v. Wilson*, 405 U.S. 518 (1972), prohibition of speech which merely tends to lead to illegal activity is unconstitutional.

> [H]ow infinitely more doubtful and uncertain are the boundaries of an offense including a diversion tending to a breach of the peace' . . . .

Gregory v. Chicago, 394 U.S. 111, 119 (1969) (Black, J., concurring). Yet, the district court applied this very language when it interpreted §3604(a) as prohibiting statements which "would tend to influence, based on race, the housing choices of a reasonable prospective home buyer." (MO at 112; A134). Thus, the district court ignored this Court's holdings that speech may be censored only if it is likely to produce an imminent illegal activity. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

The testimony before the Court itself provides examples of the chilling effect this opinion might have on the dissemination of otherwise protected factual information. For example, testimony of the potential purchasers indicated that the purchasers themselves found information regarding unrest in the local high school valuable in deciding whether to purchase the home (MO at 110; A132-33). Yet, the real estate agent expressed fear in telling them about the conditions in the high school because "it would be called steering" (MO at 112; A134). This demonstrates that that district court's vague definition of "steering" could have a chilling effect on the dissemination of information which potential purchasers desire to know.

CONCLUSION

For all of the above reasons a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,

ANTHONY J. DIVENERE, *Counsel of Record*
BURKE, HABER & BERICK CO., L.P.A.
300 National City Bank Building
629 Euclid Avenue
Cleveland, Ohio 44114
(216) 771-2700

RICHARD A. DEAN
ARTER & HADDEN
1100 Huntington Building
Cleveland, Ohio 44115
(216) 696-1100
Counsel for Petitioner

85-1157

No.

In the Supreme Court of the United States

October Term, 1985

HILLTOP REALTY, INC.,
Petitioner,

vs.

CITY OF CLEVELAND HEIGHTS and
HEIGHTS COMMUNITY CONGRESS,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

ANTHONY J. DIVENERE, *Counsel of Record*
BURKE, HABER & BERICK CO., L.P.A.
300 National City Bank Building
629 Euclid Avenue
Cleveland, Ohio 44114
(216) 771-2700

RICHARD A. DEAN
ARTER & HADDEN
1100 Huntington Building
Cleveland, Ohio 44115
(216) 696-1100

Counsel for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

Opinion of the Court of Appeals for the Sixth Circuit (October 2, 1985) A1

Memorandum and Order of the United States District Court (July 2, 1985) A19

Memorandum and Order of the United States District Court (November 30, 1983) A49

Judgment Entry of the Court of Appeals for the Sixth Circuit (October 2, 1985) A207

Article III, Section 2, Clause 1, Constitution of the United States A209

First Amendment, Constitution of the United States A209

42 U.S.C. Section 3604, Fair Housing Act, Title VIII, Civil Rights Act of 1968 ..... A210

42 U.S.C. Section 3612, Fair Housing Act, Title VIII, Civil Rights Acts of 1968 ..... A211

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided and Filed October 2, 1985)

Nos. 84-3427, 3442

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HEIGHTS COMMUNITY CONGRESS, on and behalf of itself and all black and white persons residing in Cleveland Heights, Ohio; CITY OF CLEVELAND HEIGHTS, OHIO,
Plaintiffs-Appellees (84-3427),
Plaintiffs-Appellants (84-3442),

v.

HILLTOP REALTY, INC.; VINCENT AVENI; and BRUCE JOHANNS,
Defendants-Appellants (84-3427),
Defendants-Appellees (84-3442).

ON APPEAL from the United States District Court for the Northern District of Ohio, Eastern Division.

Before: MERRITT and KENNEDY, *Circuit Judges;* and PHILLIPS,* *Senior Circuit Judge.*

KENNEDY, *Circuit Judge.* Defendants appeal the District Court's declaratory judgment that they engaged in

---

*Honorable Harry Phillips participated in oral argument but due to his death on August 3, 1985 took no part in the opinion.

racial steering on eight occasions, in violation of Title VIII of the Civil Rights Act of 1968, otherwise known as the Fair Housing Act, 42 U.S.C. § 3604(a) (otherwise denying housing because of race), and on one occasion in violation of § 3604(c) (making statement indicating racial preference in housing); and blockbusting by mail solicitation on one occasion in violation of § 3604(e) (inducing sale for profit by representation involving race).[1] Plaintiffs are the City of Cleveland Heights (City or Cleveland Heights) and the Heights Community Congress (HCC), an umbrella organization of civic groups that monitors compliance with the fair housing laws. In addition to declaratory relief, the District Court awarded HCC $1 in nominal damages, but declined to grant injunctive relief. Defendants Hilltop Realty, Inc. (Hilltop) and Bruce Johanns, a Hilltop agent, appeal the court's findings that they violated the Fair Housing Act and the awarding of nominal damages; plaintiffs appeal from the court's denial of injunctive relief. We reverse the District Court's finding that defendants violated § 3604(e); in all other respects, we affirm.

---

1. The pertinent subsections of § 3604 provide that "it shall be unlawful—"

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.
>
> . . . .
>
> (c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.
>
> . . . .
>
> (e) For profit, to induce or attempt to induce any person to sell or rent any dwellling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin.

I.

Cleveland Heights, a municipal corporation organized under Ohio law, is a suburb of the City of Cleveland, bounded by Cleveland on the west, East Cleveland and Cleveland on the north, South Euclid and University Heights on the east, and Shaker Heights on the south. The City had a population of 57,767 in 1970 and 56,438 in 1980. Black residents comprised 2.5% of its population in 1970 and 24.9% in 1980, with greater concentrations of blacks in areas adjacent to East Cleveland, which had a black population of 58.6% in 1970 and 86.5% in 1980. Most of the overall increase of black residents in Cleveland Heights occurred from 1970-76.

In 1965 and again in 1972, the homes of black residents who had recently moved into the community were bombed, and around the same time several areas of the City were the subject of heavy real estate solicitation. Among the actions of the City in response was a proclamation in 1965 declaring Cleveland Heights to be a racially open community, a 1967 ordinance forbidding "for sale" signs on private residences, a 1972 anti-telephone solicitation ordinance, and adoption in 1976 of a comprehensive real estate program, including an ordinance forbidding discrimination in housing, blockbusting, steering, and solicitation of homeowners who have filed no-solicitation notices.

HCC was founded in 1972. It is a not-for-profit corporation under Ohio law, which has as its primary objective the promotion and maintenance of Cleveland Heights as an open and integrated community. Its membership includes governmental representatives; school board, library, religious and other community-wide groupings; businesses and merchants; and neighborhood organizations. Two of its major programs have been periodic new homebuyer ques-

tionnaire surveys and audits of realty companies and agents, including a 1978 audit contracted for by the City. Auditing was carried out through the use of "checkers—paired black and white volunteers who represented to real estate agents that they were seeking housing and presented the agents with similar needs and circumstances. The results of that audit led to filing of the instant lawsuit.

II.

Preliminarily, defendants argue that the City and HCC lacked standing to sue since they failed to prove injury.

> [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Glandstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26, 38, 41 (1976).

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (footnote omitted).

In *Gladstone,* the Court held that a municipality had standing to sue for violations of the Fair Housing Act. It reasoned that the municipality itself suffered an injury traceable directly to such violations:

> The adverse consequences attendant upon a "changing" neighborhood can be profound. If petitioners' steering practices significantly reduce the total number of buyers in the Bellwood housing market,

> prices may be deflected downward. This phenomenon would be exacerbated if perceptible increases in the minority population directly attributable to racial steering precipitate an exodus of white residents. . . . A significant reduction in property values directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services. Other harms flowing from the realities of a racially segregated community are not unlikely. . . . If, as alleged, petitioners' sales practices actually have begun to rob Bellwood of its racial balance and stability, the village has standing to challenge the legality of that conduct.

441 U.S. at 110-11 (citations & footnotes omitted).

Similarly, in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982), the Court held, with respect to the standing of an organization similar to HCC:

> If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income home-seekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests . . . .

Prior to trial, the District Court ruled that the City and HCC alleged facts sufficient to establish standing. Defendants' argument is that these facts may be contested at trial, quoting language to that effect in *Bellwood*, 441 U.S. at 115 & n.31, and that since plaintiffs failed to sub-

stantiate that they had suffered actual injury of the kind postulated by the Court in *Bellwood* and *Havens*, the complaint should have been dismissed for lack of standing. Specifically, defendants argue that the City was relatively stable racially when the alleged violations occurred, and that the City failed to prove "any connection between any of the alleged violations and any threatened resegregation." Hilltop's Brief at 17. As to HCC, defendants rely on the District Court's finding in awarding only nominal damages that HCC failed to produce evidence of a causal connection between its expenditures and the alleged violations.[2]

The District Court acknowledged defendants' argument that the facts underlying standing remain to be proven at trial, concluding that "it is clear that the record provides facts which are sufficient to support plaintiffs' pretrial allegations of actual and threatened injury." Regardless of the merits of defendants' contention that its alleged violations caused plaintiffs no actual injury,[3] we believe that defendants misconstrue the language from *Bellwood* on which they rely. Defendants concede that the first requirement for standing is actual *or threatened* injury. Their argument collapses standing to litigate allegedly

---

2. The court did find, however, that defendants' violations "perceptively impaired" HCC's ability "to carry out its policy of maintaining Cleveland Heights as an open and integrated community; and that it has been necessary to expend funds to finance these monitoring activities." The latter remark suggests that the court's ruling on enomonic injury was not that HCC had suffered no such injury, but that the amount of its expenditures attributable to defendants' violations was too speculative to support a damage award.

3. The District Court made meticulous findings of fact that defendants' violations caused or threatened the City and HCC with the type of injuries described by *Bellwood* and *Havens* as providing a basis for standing. We cannot say that these findings were clearly erroneous.

wrongful conduct into adjudication of the merits of the controversy. The "facts" which remain open to challenge at trial are those asserted by plaintiffs alleging that they are in the *position* to be caused injury as the result of the defendants' conduct. *Cf. United States v. SCRAP*, 412 U.S. 669 (1973) (plaintiff environmental groups' theory that ICC regulation would cause their members economic, recreational and aesthetic harm by discouraging recycling and thus adversely affecting the environment, was sufficient to withstand dismissal on standing grounds, subject to proof that its theory is "something more than an ingenious academic exercise in the conceivable," *id.* at 688). Here, there is no doubt that plaintiffs were in a *position* to be injured by defendants' alleged Fair Housing violations, and thus they have alleged and proven facts sufficient to establish actual *or threatened* injury.

III.

The District Court found that five Hilltop agents violated § 3604(a) on eight occasions between 1976 and 1978 by engaging in "racial steering," which the court determined "otherwise made unavailable" housing on account of race. These violations were imputed to Hilltop. Only one of the violations occurred within the 180-day limitations period prior to the date this suit was filed. The District Court held that the complaint was timely as to all violations alleged based upon its finding that they constituted a continuing pattern and practice of unlawful conduct.

In *Havens*, the Court adopted plaintiffs' definition of "racial steering" as:

> a "practice by which real estate brokers and agents preserve and encourage patterns of racial segregation in available housing by steering members of racial

> and ethnic groups to buildings occupied primarily by members of such racial and ethnic groups and away from buildings and neighborhoods inhabited primarily by members of other races or groups."

455 U.S. at 366 n.1.

Although in *Bellwood* and *Havens* the Court did not specifically address whether the racial steering violates Title VIII, *see Bellwood,* 441 U.S. at 91 n.32, *Havens,* 455 U.S. at 370 n.7, the District Court held that in the absence of significant discriminatory effect, which it found was not present in this case, an incident of racial steering would violate § 3604(a) upon a showing of intent. Defendants do not directly dispute this interpretation of the law. Rather, they argue that truthful informational statements with racial content, failure to show homes in a particular location absent a specific request, and lack of service, do not violate the Act. The District Court was correct in holding that to violate § 3604(a), one looks to whether the statement or conduct would have an untoward effect on a reasonable person under the circumstances who is seeking housing, and behind the statement or conduct to the intent of the agent. If a statement or act would have a discriminatory effect and is made with the intent to steer, it violates § 3604(e). *See Zuch v. Hussey,* 394 F. Supp. 1028, 1045-46 (E.D. Mich. 1975), *aff'd and remanded,* 547 F.2d 1168 (6th Cir. 1977).

The District Judge painstakingly reviewed the facts of each alleged § 3604(a) violation and applied the above principles of law to his findings. In several instances he found that plaintiffs had failed to establish either an act that would constitute steering, or the requisite intent. The essence of defendants' objections to the court's find-

ings is that they were unsupported by the record. Discriminatory intent is a question of fact subject to the clearly erroneous standard of review. *Anderson v. City of Bessemer City,* 105 S. Ct. 1504, 1511 (1985).

Of particular importance, since it constitutes the linchpin supporting the remaining violations found by the District Court, is the violation which occurred within the limitations period. In October 26, 1978, Hortense Johnson, a black checker, began an audit of Hilltop agent Elayne Liff. After Johnson had described her needs to Liff, Liff attempted to contact the owner of one home, who was black, that met Johnson's description. After determining that the home had been taken off the market, Liff suggested no other homes to Johnson, either at that time or in the days following. Four days later, in a call in response to Johnson's follow-up call, Liff stated that she was busy preparing for a vacation trip to Hawaii and would contact Johnson upon her return. She did not offer to arrange for another agent to assist Johnson.

The District Judge carefully reviewed the testimony of Johnson and Liff. He found that Liff's normal practice would have been to suggest additional listings to Johnson during her initial visit besides the single black-owned home about which Liff inquired, and to refer Johnson to another agent if Liff was unavailable to help her. The court observed that although Liff claimed she was suspicious of Johnson, these suspicions were irrelevant to whether, in departing from her normal procedure, Liff denied Johnson the opportunity to see available homes on the basis of race, because Liff also testified that despite her suspicions, she " 'still went about [her] business in the usual manner.' " The court concluded that Liff's failure to provide service to Johnson violates § 3604(a).

A finding is clearly erroneous when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake had been committed. The question is not whether the finding is the best or only conclusion that can be drawn from the evidence, or whether it is the one which the reviewing court would draw. Rather, the test is whether there is evidence in the record to support the lower court's finding, and whether its construction of that evidence is a reasonable one. *See Anderson*, 105 S. Ct. at 1511-12. Applying this test in the instant case, we cannot say that the District Court's finding that Liff committed a violation of § 3604(a) is clearly erroneous. Nor were the court's findings clearly erroneous respecting the other § 3604(a)violations, or the § 3604(c) violation, although we note that Hilltop states in its brief to this Court "that defendants are appealing the District Court's findings of violations in respect of the sole incident which occurred within the limitations period" Defendant Hilltop's Brief at 55.

In *Havens*, the Court held "that where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice." 455 U.S. at 380-81 (footnote omitted). Defendants' argument that the court erred in holding that the individual violations found satisfied the continuing violation requirement amounts to nothing more than a disagreement with the District Court's view of the evidence in its entirety. The court's finding on this point was not clearly erroneous.

Defendants also object that the District Court erred in finding that Hilltop had "the power to control the acts"

of its agents, quoting *Marr v. Rife,* 503 F.2d 735, 742 (6th Cir. 1974), and hence was liable for the violations committed by those agents. It argues that its agents were independent contractors, over whom under common law it has no control. This argument has consistently been rejected in Fair Housing Act cases. *See, e.g., Green v. Century 21,* 740 F.2d 460, 465 (6th Cir. 1984) (citing *Marr v. Rife, supra*); *Northside Realty Associates, Inc. v. United States,* 605 F.2d 1348, 1353-54 (5th Cir. 1979). Nor does Hilltop dispute the District Court's findings respecting knowledge of Hilltop managerial personnel of fair housing violations by its agents and failure to take corrective action, despite its asserted policy of instructing its agents in fair housing law and urging that they act accordingly. The court did not err in holding Hilltop liable for the violations of its agents.

IV.

The District Court also found that Hilltop and its agent Bruce Johanns had violated § 3604(e), when Johanns mailed solicitation cards to 40 to 60 residents in a two block area of Census Tract 1401 in northeast Cleveland Heights. Johanns worked as a painting contractor in the area between 1974 and 1977, during which time he solicited painting jobs by mail. Upon becoming a Hilltop agent in 1977, he sent an announcement card to the residents of the area. In August 1978, he sent a card to residents announcing that a home in the neighborhood had been listed with him, which said: "If you have a friend or relative who would like to live near you, please have them give me a call, and I will be pleased to give them all the details and arrange for them to see it." The listed home, which had a black owner, was sold to a white buyer. In September 1978, he sent out another post card, which

stated that the listed home had been sold, and represented: "In selling this property, we came into contact with other families who wish to buy in your neighborhood. Are you interested in selling your property? We would welcome the opportunity of consulting with you without obligation." Johanns admitted that there were no other families that had contacted him wishing to buy in the neighborhood. It is the September mailing that the District Court found violated § 3604(e).

In *Zuch,* Judge Keith held that:

> Section 3604(e) . . . is aimed at both overt "blockbusting" and other uninvited solicitations in racially transitional neighborhoods where it can be established (1) that the solicitations are made for profit, (2) that the solicitations are intended to induce the sale of a dwelling, and (3) that the solicitations would convey to a reasonable man, under the circumstances, the idea that members of a particular race are, or may be, entering the neighborhood.

394 F. Supp. at 1049.

There is no question that Johanns' September mailing was made for profit and intended to induce the sale of a dwelling. However, an inducement to sell only violates § 3604(e) if, as provided in the statute, it includes "representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race." Such representations may be obvious or subtle, *Zuch,* 394 F. Supp. at 1049, but a represenation respecting race must be made. The third part of the test stated by Judge Keith in *Zuch* merely restates the representation requirement in a way that encompasses both direct and subtle references to race. Thus, the critical question in

the instant case is whether the post card sent by Johanns contained a representation that would convey to reasonable persons in the solicited area that blacks were seeking to move into the neighborhood.

In resolving this question in any given case, "[t]he concept of a racially transitional neighborhood is critically important to this litigation, because it is within this context that the activities of the real estate industry, in general, and the defendants, in particular, must be scrutinized." *Zuch*, 394 F. Supp. at 1033. The court found the solicited area to be a "racially transitional neighborhood."[4] It found that Johanns was warned by one resident, Mr. Hollis, after his first mailing that the resident had filed a no-solicitation card with the City and that Johanns had violated the City's no-solicitation ordinance by mailing the card to him, and that another resident, Mr. Ciocia, had complained to Hilltop after the August and September mailings. The court credited the testimony of Mr. Ciocia that he was fearful of the effect of the post cards, and that of another witness, Mr. Russo, a person with experience in real estate who lived near the solicited area, who testified that if he lived in the solicited area and received one of the cards, he would have been concerned. The court concluded that Johanns was aware of the racial composition of the neigh-

---

4. The record shows that the two block area solicited by Johanns was virtually an all-white enclave in an otherwise integrated neighborhood. Census Tract 1401 had an estimated nonwhite population of 22% in 1978, 29% in 1979 and 37% in 1980, although the census statistic for 1980 was 30.7% nonwhite. Neighboring census tracts contained census blocks with black populations substantially higher than the 24.9% overall figure for Cleveland Heights. On the basis of these figures, the District Court determined that the solicited area was transitional, quoting language from *Zuch* to the effect that a "racially transitional neighborhood" or "changing neighborhood" "[t]o the layman . . . is used and understood to mean that blacks are moving into an area." 394 F. Supp. at 1031.

borhood, and that to have continued to solicit "in a neighborhood that he knew was racially transitional and, therefore, subject to the fears of panic selling, rendered his acts of solicitation at least reckless." Thus, although the card sent by Johanns was completely neutral on its face,[5] the court found that it contained a representation respecting race because he knew that any form of solicitation would be likely to excite the fears of neighborhood residents and trigger panic selling.

The statute does not prescribe that a § 3604(e) violation may only occur when a prohibited representation is made in a transitional neighborhood. Whether a neighborhood is in transition is significant only to the extent that its residents become more susceptible to the exploitative tactics of blockbusting.

> It is a well known fact that racial tensions and anxieties are generated when blacks move into previously all-white neighborhoods. It is also well known that many real estate agencies attempt to exploit such a situation by making repeated, uninvited solicitations for the sale of homes. In most instances, this activity (commonly referred to as "blockbusting") has proven to be an effective means of stimulating the sale of homes in racially transitional neighborhoods. It does so by capitalizing upon the racial fears of whites, reminding them that blacks are moving into the area. The process was articulated quite clearly in *United States v. Mitchell*, 335 F.Supp. 1004, 1005-1006 (N.D.

---

5. There were no subtle representations by Johanns of the sort present in *Zuch*—salespersons showing houses to black persons at night with lights on and windows unobstructed, flyers picturing or in-person visits by black agents, or literature containing thinly vailed references to neighborhood safety and other concerns foremost in the minds of white residents in neighborhoods undergoing change.

Ga. 1971), where the United States District Court for the Northern District of Georgia stated:

> "The evidence at the trial disclosed many illuminating things about what happens in a residential neighborhood when it becomes racially transitional. For example, if these cases are typical—and the court believes they are—the following consequences can be predicted as inevitable, and beyond dispute: First, a sense of panic and urgency immediately grips the neighborhood and rumors circulate and recirculate about the extent of the intrusion (real or fancied), the effect on property values and the quality of education. Second, there are sales and rumors of sales, some true, some false. Third, the frenzied listing and sale of houses attracts real estate agents like flies to a leaking jug of honey. Fourth, even those owners who do not sell are sorely tempted as their neighbors move away, and hence those who remain are particularly vulnerable. Fifth, the names of successful agents are exchanged and recommended between homeowners and frequently the agents are called by the owners themselves, if not to make a listing then at least to get an up-to-date appraisal. Constant solicitation of listings goes on by all agents either by house-to-house calls and/or by mail and/or by telephone, to the point where owners and residents are driven almost to distraction.
>
> In this maelstrom the atmosphere is necessarily charged with Race, whether mentioned or not, and as a result there is very little cause or necessity for an agent to make direct representations

> as to race or as to what is going on. On the contrary both sides already know, all too well, what is going on. In short, for an agent to get a listing or make a sale *because* of racial tensions in such an area is relatively easy, whereas the direct mention of race in making the sale is superfluous and wholly unnecessary." (Emphasis by the Court)

Zuch, 394 F.Supp. at 1049-50.

A racially neutral form of solicitation may very well contain an obvious representation respecting race in a highly charged atmosphere such as that described above. Such an atmosphere was not, however, present in the instant case. Although the solicited neighborhood could fairly be described as transitional, in the sense that residents perceived that blacks were moving into it or adjacent areas, its residents were not in the grip of panic. The neighborhood was not the subject of frenzied real estate activity. Johanns was a white real estate agent who sent a racially neutral card to the residents of a small area, many of whom were former painting customers and knew Johanns, following up a sale of a black-owned home to a white buyer. While we do not suggest that real estate agents are "entitled to one bite" in transitional neighborhoods before panic has set in, the essence of the District Court's reasoning is that any form of solicitation in any area into which blacks have moved or are moving is a *per se* violation of § 3604(e). We have serious doubts that such a sweeping restriction on commercial speech would be constitutional, *see Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), and do not believe that Congress intended the statute to be so applied. *See Zuch*, 394 F.Supp. at 1046 ("Fair Housing Act . . . was designed to provide, within constitutional limit, for fair

housing throughout the United States"). We do not agree with plaintiffs that the difference between the instant case and *Zuch, Mitchell,* and other cases finding § 3604(e) violations is merely one of degree. In the absence of evidence of panic selling or other incidents of a racially charged atmosphere that would impute to any real estate solicitation a racial connotation, or evidence of an actual representation respecting race, whether suggestive or direct, there simply has not been a prohibited representation within the meaning of § 3604(e). Since neither was proven in the instant case, we reverse the District Court's finding that the mailing violated § 3604(e).

V.

Plaintiffs appeal from the District Court's denial of injunctive relief. The Act provides that, "The court may grant relief, *as it deems appropriate,* any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees . . . ." 42 U.S.C. § 3612(c) (emphasis added). Hence, the District Court's decision not to enjoin defendants is subject to review under the abuse of discretion standard.

Upon plaintiffs' motion, the court carefully reconsidered its prior decision not to award injunctive relief. It concluded that plaintiffs had not proved that Hilltop was likely to continue to commit steering violations in the future.[6] Further, the court noted that, pursuant to 28 U.S.C. § 2202, "Further necessary or proper relief based

---

6. The salesperson responsible for four of the violations left the employ of Hilltop before the action was filed. A salesperson responsible for another incident has also left its employ.

on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." The court stated that, "Should the defendants engage in further conduct which constitutes a violation of the Fair Housing Act and the plaintiffs file a supplemental claim to that effect, this court, pursuant to section 2202, is obliged to entertain and determine whether that has occurred. If established, there would then be a predicate for injunctive relief." Regardless of whether the court would have been warranted in issuing an injunction, or whether an injunction would have been the most appropriate form of relief, plaintiffs have not shown that the District Court abused its discretion in fashioning relief in this case.

Defendants argue that awarding of nominal damages of $1.00 by the District Court was error in light of the plain language of the statute providing for the award of "actual damages." Contrary to the assertion of defendants, the District Court did find that HCC had suffered a non-quantifiable injury at the hands of defendants, which would justify the award of nominal damages. *See* note 2 *supra*.

VI.

We reverse the judgment of the District Court finding that Hilltop and its agent Bruce Johanns violated § 3604 (e). In all other respects, the judgment of the District Court is AFFIRMED.

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed July 2, 1985)

C79-422

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

HEIGHTS COMMUNITY CONGRESS, *et al.*
Plaintiffs,

v.

HILLTOP REALTY, INC., *et al.*
Defendants.

MEMORANDUM AND ORDER

THOMAS, *Senior Judge*

Heights Community Congress has applied for attorney's fees for its two attorneys, Avery S. Friedman and Kathryn Gonser Eloff. On March 7, 1979, Heights Community Congress (HCC), five individual plaintiffs, for themselves and others similarly situated, and the City of Cleveland Heights (City), filed a fair housing complaint against Hilltop Realty, its president and five individual sales agents. In filing the complaint, Mr. Friedman represented Heights Community Congress and the individual plaintiffs, and Mr. Donald Barclay, Law Director for the City of Cleveland Heights, represented the City. On July 10, 1981, Ms.

Eloff filed her appearance of counsel in the case for HCC and one individual plaintiff.[1]

In its memorandum and order of January 2, 1985, this court determined that plaintiffs HCC and the City of Cleveland Heights were "prevailing plaintiff[s]" under U.S.C. §3612(c). Later, on March 21, 1985, the court determined that "only HCC [met] the financial inability test of section 3612(c)," and therefore "[only] HCC may recover reasonable attorney's fees." In its ruling of January 2, 1985, this court concluded that the "same standards should apply to determine whether the plaintiff was 'prevailing' under section 3612(c) as to determine whether a plaintiff was a 'prevailing party' under section 1988." Similarly, this court herein applies the directions of *Hensley v. Eckerhart*, 461 U.S. 424 (1983), which was decided under 42 U.S.C. §1988, in determining what attorney's fees should be awarded under section 3612(c) to Heights Community Congress.

The question of allowing costs, other than attorney's fees, is considered in a separate memorandum filed concurrently with the instant memorandum.

I.

A.

Plaintiffs Heights Community Congress and the City of Cleveland Heights on December 19, 1983 jointly moved for an order "granting reasonable attorney fees and re-

---

1. By the time Ms. Eloff filed her appearance, all individual plaintiffs except Sandra McGee had been dismissed for lack of standing, pursuant to this court's memorandum and order of December 31, 1980.

lated cost of litigation."[2] Supported by affidavits, HCC requested $210,000 for Mr. Friedman and $82,095 for Ms. Eloff.

To evaluate the amount claimed, *Hensley* instructs that the most useful starting point is to calculate "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." 461 U.S. at 433. As the party seeking an award of fees for attorneys Friedman and Eloff, plaintiff Heights Community Congress "bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." *Id.* at 437. *Accord, Webb v. Board of Education,* 105 S.Ct. 1923, 1928 (1985). It is essential, therefore, to first ascertain whether the number of hours claimed by each of HCC's attorneys were "reasonably expended on the litigation."

B.

While Mr. Friedman was lead counsel in representing Heights Community Congress, the time records of his co-counsel, Ms. Eloff, will be evaluated first because Mr. Friedman relies in part on Ms. Eloff's time records in reconstructing his time records. In the December 19, 1983 motion, Ms. Eloff, "a lawyer affiliated with this litigation from June, 1981 through June, 1983," on behalf of the HCC sought an award of fees for her legal services.

Ms. Eloff graduated from law school in January 1981 and was admitted to the Ohio Bar on May 11, 1981. On May 19, 1981, she was admitted to practice in this court, and on July 10, 1981, she entered her appearance as HCC's

---

2. On March 21, 1985, this court, applying the financial inability proviso of 42 U.S.C. §3612(c), found that the City was "financially able to assume" its attorney's fees, and therefore not entitled to an award of attorney's fees.

co-counsel. In an attached affidavit, she itemizes a total of 44.8 hours performed as a law clerk from February 8, 1981 through May 1, 1981. Ms. Eloff claims 1,009.5 hours for work as an attorney from May 3, 1981 through June 17, 1983.[3] Ms. Eloff has requested a rate of $45.00 per hour for her legal services as HCC's law clerk and $75.00 per hour as HCC's attorney.

(1)

Ms. Eloff moves for reconsideration of this court's finding of March 21, 1985, "that from February through the time that she was admitted to practice, Ms. Eloff worked as a volunteer." She submits supporting affidavits of Avery S. Friedman and Lana Cowell, Executive Director of the Heights Community Congress. Affiant Cowell states that she informed Ms. Eloff "that the Heights Community Congress would be unable to pay her law clerk or attorney fees, but that she might recover fees if we prevail in the *Hilltop* suit." In part, Mr. Friedman states that in February 1981 he informed Ms. Eloff that he "welcomed her assistance as a law clerk."

While the Heights Community Congress took no contemporaneous action which recognized Ms. Eloff's status as its law clerk for the period from February through June 1981, a Board resolution confirming that fact was adopted on January 3, 1984. In part, that resolution recognized that "from February until June 1981, Kathryn Eloff worked as law clerk on behalf on Plaintiff Heights Community Congress in [the Hilltop] case." Further, the resolution recognized that in June 1981 she became an

---

3. Ms. Eloff was appointed assistant law director of the City of Cleveland Heights on June 27, 1983 and seeks no attorney fees after June 17, 1983 (the date of closing arguments).

attorney at law and that from then until December 1983 "she was one of the two attorneys who represented Plaintiff Heights Community Congress in the [Hilltop] litigation." Thus, the HCC Board ratified her legal relationship with the Heights Community Congress, first as its law clerk and then as one of its two attorneys.

Although Ms. Eloff volunteered initially to help HCC with legal assistance, the court now concludes, based on a more complete record, that her undertaking of "research and writing re class certification" and her "preparation of materials" on March 16, 1981 indicate that by that time the organization had engaged her in the capacity of law clerk. Hence, Ms. Eloff's motion for reconsideration is granted and the finding in the last sentence of p.6, n.5 of the court's memorandum and order of March 21, 1985 is withdrawn.[4]

(2)

Ms. Eloff's time records appear to be reliable. At the hearing of April 9, 1985, Ms. Eloff produced monthly calendars for the years 1981, 1982 and 1983 containing entries showing hours or fractions of hours expended on the HCC case and the nature of the services performed. Ms. Eloff testified that in her first meeting with Mr. Friedman (some time between February and May 1981), he told her to keep track of her hours, and "we would apply for fees." Ms. Eloff testified that "each entry was made the day [she] did the work, although some evening time was recorded the next day." When the cross-examiner noted that her hours were rounded, she responded, "I always rounded down." It is concluded that Ms. Eloff's

---

4. As it turns out, the vacation of this finding is of limited benefit to Ms. Eloff. *See infra*, part II.A.

time records reliably reflect both the hours or fractions of hours expended and the nature of the work done.

In its "initial fee calculation," the court should exclude hours that were not "reasonably expended." *Hensley,* 461 U.S. at 434. It is noted that "[c]ounsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." *Id.*

Having in mind these cautions, it is noted that Ms. Eloff admitted to counsel for Hilltop that there were occasions when both she and Mr. Friedman were present at depositions on behalf of HCC, although "not very often," and also there were occasions when both were present at hearings. As evidenced in her time records and as disclosed in her testimony, it was Ms. Eloff who prepared the "checker" witnesses for their depositions and indeed, also for their appearance at trial. It is also evident that she spent many hours organizing materials that were used in answering interrogatories, which necessarily might also have been related to preparation for depositions or preparation for trial. It is concluded that any joint attendance of Ms. Eloff and Mr. Friedman at depositions or court hearings did not entail services that were either "excessive, redundant, or otherwise unnecessary." Moreover, Ms. Eloff testified that "on most tasks, there was only one lawyer working at any given time."

From the entire record, it is concluded that the hours contained in the time records of Ms. Eloff from March 16, 1981 through June 1983 were reasonably expended in this litigation. The number of these hours totalled 46.8 as

HCC's law clerk from March 16 to May 11, 1981, and 1,016.3 as an attorney for HCC.[5]

C.

In the joint motion of December 19, 1983, it is stated that Avery S. Friedman, "a federal fair housing law specialist . . . [b]ecause of the complex and novel nature of this litigation . . . seeks recovery for approximately 1,500 hours, which are not precise and are quite conservative, at a $140 hourly rate for an amount of $210,000." No daily itemization of his services was attached. However, in a reply memorandum, which it was permitted to file in response to defendant Hilltop's brief, plaintiff HCC submitted to the court "additional supplemental information." Included was an affidavit of Avery S. Friedman dated March 8, 1984. Attached to his affidavit are exhibits A through E which itemize hours expended by day for late 1978 and for 1979, 1980, 1981, 1982 and 1983/84. In addition to the itemized hours, he stated that "[a]bout 135 hours were devoted to in-deposition time." Mr. Friedman's affidavit reads that in 1978 "it would be a conservative estimate to state [t]hat no less than 50 hours were devoted to these activities in preparation of this litigation."[6] He goes on to state:

---

5. The court independently added the hours itemized on exhibits A through D in Ms. Eloff's affidavit and the totals for exhibits B and D were slightly higher than the totals listed therein.

In connection with her legal services, Ms. Eloff noted time separately for copying materials or delivering materials. When asked if a non-legal person could have performed these services, Ms. Eloff noted that she had no staff. Because these hours are relatively few, no reduction of hourly rates for these hours has been made. Nor has the court allowed Ms. Eloff her claimed out-of-pocket expenses, which were only about $21.

6. The court assumes from this statement that six of these hours in November and December are itemized on Exhibit A and are included in the total 50 hours.

Including 135 deposition hours, the approximately 50 hours in 1978 and the remaining hours identified in the exhibits, an approximate total of 1,406.75 hours have been devoted to this litigation up to March 8, 1984, calculated from notes, calendar entries, records of counsel and independent recollection.

With reference to the 135 hours claimed for "in-deposition time," *i.e.*, deposition attendance time, on June 14, 1985, this court ordered Mr. Friedman to compute actual hours in attendance at depositions based on the time entries of the court reporters. The court provided a formula for computing hours where time entries were not available. The formula is one hour per 40 pages of transcript. Mr. Friedman submitted an affidavit on June 18 listing a total of 125.6 hours and adding 8.5 hours for preparation of factual supplementation. His claim for these hours, all of which is found to be reasonably expended in this litigation, is rounded to 134 hours.

The court next considers the hours claimed prior to the filing of the complaint on March 7, 1979. Although Mr. Friedman stated in his affidavit that he devoted 50 hours to preparation of this litigation in 1978, in exhibit A he provided an itemized description of work performed for only six of those hours. The court determines that his general claim of 50 hours is insufficient, and at best he may only claim for 1978 the six hours itemized on exhibit A.[7]

---

7. In *Webb v. Board of Education*, 105 S.Ct. at 1928-29, the Court observed:

> Of course, some of the services performed before a law suit is formally commenced by the filing of a complaint are performed "on the litigation." Most obvious examples are the drafting of the initial pleadings and the work associated with the development of the theory of the case.

(Continued on following page)

It must next be decided whether Mr. Friedman has submitted evidence to support "the hours worked" as claimed in exhibits A through E attached to his March 8, 1984 affidavit. In short, has he shown that his "documentation of hours" is adequate and reliable? The parties were notified that a hearing would be held on April 9, 1985 "to determine what fees are 'reasonable' for the services rendered by HCC counsel," and that "the guiding principles" of *Hensley,* 461 U.S. at 433-37, "will govern this court's determination."

At the hearing, Mr. Friedman testified that in reconstructing the 1979 time records (Exhibit A), he had used some contemporaneous time slips through the filing of the complaint. For the balance of 1979 and the years 1980, 1981, 1982 and 1983, Mr. Friedman testified that he took "pieces of paper, when he remembered to do it, and wrote down time devoted to a particular activity." But he acknowledged that "there was no formal method of entering times on every occasion contemporaneously." He thus summarized how he reconstructed his submitted time records (Exhibits A-E):

> In the process of developing the number of hours, the method which we used—and this applies from '79 through the present time—is to take actual time slips, telephone messages, review documents, that is, a documentary review of all the filings, compare and contrast the hours submitted by Ms. Eloff, Ms. Quereau

---

Footnote continued—

Mr. Friedman's entries for 1978 and 1979 include meetings with HCC, Mr. Barclay and potential plaintiffs; review of the proposed complaint with lawyers and with parties; and preparation and review of final complaint and related memorandum. The court determines that the entries from November 6, 1978 through March 6, 1979 qualify under the *Webb* rubric as preliminary services which are performed "on the litigation."

> and Mr. Barclay, and rely on recollection of time expended, to ascertain the time devoted.

In HCC's post-hearing brief of April 29, 1985, Mr. Friedman, relying on his testimony, similarly explained how he reconstructed his time:

> The reconstruction was based upon the specific information of legal time expended by reference to Ms. Eloff's notes, Mr. Barclay's information, specific expenditures and inclusions of time spent by HCC staff [Lana Cowell and Gay Quereau] designating meetings with Mr. Friedman, actual time expenditures, and reconstruction of time at trial.

What probative value therefore should this court accord to Mr. Friedman's reconstructed time records? *Hensley* suggests that expenditure of reasonable hours should be documented by contemporaneous time records. The Court states that the applicant "should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims.[12]" *Hensley,* 461 U.S. at 437. In note 12, the Court in part states:

> Plaintiff's counsel, of course, is not required to record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his time expenditures.

Id. In its recent discussion of *Hensley* in *United Slate, Tile & Composition Roofers v. G&M Roofing and Sheet Metal Co.,* 732 F.2d 495, 502 (6th Cir. 1984), the Sixth Circuit came close to requiring the keeping of contemporaneous time records to support an application for attorney fees under section 1988. The *United Slate* court stated:

> Where the documentation is inadequate, or recently compiled retrospective estimations of time expended,

> the district court would do violence to its judicial obligations were it to accept the amounts claimed at their value.

Id. Augmenting this statement in note 2, the court declared:

> The documentation offered in support of the hours charged must be of sufficient detail and probative value to enable the court to determine with a high degree of certainty that such hours were actually and reasonably expended in the prosecution of the litigation.

Id. at 502 n.2.[8]

Since Mr. Friedman's time records were not compiled from contemporaneous time records but were reconstructed as retrospective estimations of time expended, the court will consider the "documentation offered in support of the hours charged" to ascertain whether the documentation is of "sufficient detail . . . to enable this court to determine with a high degree of certainty that such hours were actually and reasonably expended in the prosecution of the litigation." *United Slate*, 732 F.2d at 502 n.2.

Since Mr. Friedman has indicated reliance on the following records, the court has examined: the breakdown

---

8. Continuing, the *United Slate* court quoted the following language from *In re Hudson & Manhattan Railroad Co.*, 339 F.2d 114, 115 (2d Cir. 1964):

> [A]ny attorney who hopes to obtain an allowance from the court should keep accurate and current records for work done and time spent. Lawyers are well aware that . . . they are valued principally on the basis of time required. There is *no* excuse for an established law firm to rely on estimates made on the eve of payment and almost entirely unsupported by daily records or for it to expect a court to do so.

732 F.2d at 502 n.2 (emphasis in original).

of hours submitted by Lana Cowell and Gay Quereau; Mr. Barclay's summary of his hours; and Ms. Eloff's time records. After examining the Barclay, Cowell and Quereau submissions, it is concluded that such documents are not of sufficient detail or relevance to support Mr. Friedman's reconstructed time records.

As for Ms. Eloff's notes, which the court has found to be accurate and reliable, there are limited common expenditures of time that permit using her notes as a means for corroborating Mr. Friedman's time entries.[9] Hence, the court turns to a comparison of trial time expenditures which are susceptible of objective verification.

Using the transcript for each trial day, the court reporter's time entries of court openings and adjournments have enabled the court to compute in-court hours for each day of trial. For the days that Ms. Eloff records her presence in court there is a close fit between the court's computation and Ms. Eloff's record of hours. The court's total is 261.25, while Ms. Eloff's total is 253. In contrast, for the days that Mr. Friedman's records contain an entry of "in court time," his total of "in-court" hours is 278.50,[10] while the court's total is 203.75 hours, which is 27 percent less than the amount claimed. Based on these calculations, the court will deduct from the total hours

---

9. Thus, the Eloff records contain an entry "8/26/82 meeting, CH, Friedman, Barclay," 1.0 hour, while Mr. Friedman's records do not contain an entry for August 26, 1982. Mr. Friedman's time records include an entry for November 9, 2.5 hours. "City Hall Liti strat meeting," but Ms. Eloff's records have no entry for November 9. On the other hand, Ms. Eloff has an entry on November 3, 1982, "Meeting re trial plan, CH, Barclay, Preparation trial plan" (total of 5 hours), but Mr. Friedman's name does not appear.

10. This total includes all hours in Exhibit E which contain entries of "in court," except the court has included only 1.5 of the 4.5 hours for the entry of March 17, which reads, "in court/out/incourt/study ruling."

claimed by Mr. Friedman this 74.75 hour overstatement of "in-court" hours.

Other than the trial transcript, no objective means is available to test the accuracy of Mr. Friedman's reconstructed time records. Hence, the claimed expenditures of hours spent out of court cannot be verified. Nevertheless, the inflated estimates of in-court time permit the inference that the out-of-court time may also be inflated. Accordingly, it is concluded that the court should reduce the claimed out-of-court expenditures of hours. One approach would be to apply the same 27 percent reduction to out-of-court time that has been applied to in-court time during the trial. However, the court concludes that this percentage reduction is too large to apply to Mr. Friedman's claimed out-of-court time. He has asserted that his time estimates are "conservative," and the court feels that he has been more conservative in preparing his out-of-court time records than in preparing his in-court records.[11] Nevertheless, questions arise with reference to

---

11. In his testimony, Mr. Friedman agreed that his February 7, 1983 entry of 7.5 hours was inaccurate. A later entry of April 18 claimed eight hours "in court." Shown a transcript for April 15, which indicated that court was adjourned until Tuesday, April 19, Mr. Friedman stated, "so obviously we did not have court on April 18."

Another in-court error relates to the court hearing held on February 5, 1981. The court hearing began at 4:30 p.m. and adjourned at 5:40 p.m. Mr. Friedman's time records contain no entry of the court hearing. Instead, on February 5, 1981, he has a .5 hour entry which reads, "rev depos plus call to DB plus second set of experts." Obviously he could have claimed .5 hours more time had he listed the actual in-court time on February 5, 1981.

As for out-of-court time, it is apparent that Mr. Friedman might have claimed one hour time on August 26, 1982 for his meeting with Ms. Eloff and Mr. Barclay, as Ms. Eloff documented. While the court has noted discrepancies in his time records, the court concludes that these discrepancies are due to faulty record keeping and not to intentional overcharge.

his claimed out-of-court time. Thus, his out-of-court time includes 15 hours on January 30, 1983, "witnesses, outline, rev prep," while Ms. Eloff's time records lack an entry for that day. Upon the entire record, the court concludes that a 20 percent reduction is warranted for Mr. Friedman's claimed out-of-court hours through March 8, 1984.[12]

The court now takes up Mr. Friedman's claim for hours expended after March 8, 1984. In his "Considerations" brief of April 8, 1985, he "submits an additional 58.0 hours from March 9, 1984 up to the weekend before the April 9, 1985 hearing," and "15 additional hours for weekend preparation and the hearing itself," which totals 73 additional hours.

On July 5, 1984, Mr. Friedman filed "Plaintiff's Memorandum in Support of Award of Attorney Fees." In Mr. Friedman's brief, which cites *Hensley,* 461 U.S. 424, he recognized that the full hearing would concern "issues of extent of success, reasonable hourly rates, etc." As previously noted, *Hensley* explicitly states that a party seeking an award of fees must "submit evidence supporting the hours worked and rates claimed," and that "[w]here the documentation of hours is inadequate, the district court may reduce the award accordingly." 461 U.S. at 433. Thus, at least as early as July 5, 1984, when he prepared his

---

12. It developed in Mr. Friedman's cross-examination that 46 percent of his hourly time records were rounded off at even hours rather than fractions of hours. Asked if it was fair to say that "rounding off indicates an estimate rather than an actual time expended based upon a record," Mr. Friedman testified, "In some instances that would be correct, in others it would not." In winding up cross-examination, Hilltop counsel pointed out to Mr. Friedman the difficulty or "perhaps even" the "impossibility" of "verifying or cross-examining you on any particular items where there isn't any documentation to support it." Mr. Friedman agreed that he "appreciated the fact that the more detailed the record, the easier it is to inquire."

memorandum, he is charged with knowing that his duty under *Hensley* required him to fully document his hours.

Mr. Friedman's failure to keep time records of hours spent in preparing the briefs of July 5, April 8, 1985, and April 29, 1985 is unexplained. For post-March 8, 1984 services rendered to HCC, Mr. Friedman will be allowed 4.5 hours for the hearing of December 24, 1984 and 11.25 hours for the hearings of April 9 and April 10, 1985, and one-half of the remaining 57.25 hours claimed. Thus, the total time for services rendered post-March 8, 1984 is rounded off to 44 hours. This time includes time spent in prosecuting HCC's application for attorney's fees, which is recoverable. *Hymes v. Harnett County Board of Education,* 664 F.2d 410, 413 (4th Cir. 1981).

Mr. Friedman attributed his failure to keep contemporaneous records to running a small office and carrying "a case load of at times . . . scores of active federal civil rights cases" and his inability to "systematize in the same fashion what the larger firms have been successful in implementing." Acknowledging that this condition "certainly doesn't justify not maintaining accurate records," he stated that "you have to understand what it's like to be a civil rights practitioner on a regular basis" and "the way the reality of the civil rights practice works." While appreciating Mr. Friedman's candor and his dilemma, the court also recognizes that when an opposing party under 42 U.S.C. §1988 is called upon to pay attorney's fees to a "prevailing party," the opposing party is entitled to "documentation" to support a fee application that is presented by that "prevailing party." In his concurrence in *Hensley,* Chief Justice Burger stated, "I read the Court's opinion as requiring that when a lawyer seeks to have his adversary pay

the fees of the prevailing party, the lawyer must provide detailed records of the time and services for which fees are sought." 461 U.S. at 440.

In sum, the court determines that of the approximately 1466 total hours claimed by Mr. Friedman for services performed to date,[13] which does not include any hours related to appeal, a total of 1135 hours were reasonably expended on this litigation as calculated below:

	Hours Claimed	Deductions	Recoverable Hours
1978 Nonitemized	44	0	0
Exhibits A - E			
In Court			
Pretrial	20	0	20
Trial	278	27%	203
Out of court	917	20%	734
Depositions	134	0	134
Post 3/8/84			
In Court	16	0	16
Out of court	57	50%	28
TOTAL	1466		1135

13. In his affidavit of March 8, 1984, Mr. Friedman claims "an approximate total of 1406.75 hours," without providing a separate total of hours in Exhibits A through E. The court's total of the hours listed in these exhibits is 1215.40. When added to other hours claimed, 44 unitemized hours for 1978, 134 hours for deposition time (rounded), and 73 hours after March 8, 1984—the total hours claimed are 1466 (rounded).

D.

(1)

The next task of the court is to fix reasonable hourly rates, calculated separately for Mr. Friedman and Ms. Eloff. In Mr. Friedman's affidavit of December 19, 1983, he stated "that a reasonable hourly rate would be $140 for the instant litigation." He noted that hourly rates granted to him in "non-complex federal fair housing and civil rights cases by the United States District Court and the United States Court of Appeals for the Sixth Circuit" have ranged from $75 per hour in 1977—1978 to $125 an hour. He then stated:

> Because of the complexity of this matter and the several novel issues involved, I was able to prepare legal memoranda and do research at substantially less time than lawyers unfamiliar with Title VIII litigation, saving substantial hours in time, effort and writing.

Mr. Friedman has submitted to the court considerable biographical and professional materials which document his expertise and reputation as a preeminent fair housing lawyer. In addition, Mr. Friedman has submitted to the court affidavits of five lawyers who practice in the greater Cleveland community who have given varying estimates of the value of Mr. Friedman's legal services ranging from $140 to $200 per hour.[14]

Two attorneys gave oral testimony on the subject. Fred J. Livingstone, a partner in the law firm of Kelley,

---

14. One believes that a reasonable hourly rate for him "could range from $150 to $200 currently." One said that "in a complex fair housing case" the reasonable value of his services as an attorney "is now and has been for the past several years, at least $150 per hour." Another, in a more general statement, said that "his reasonable hourly rate, at least in recent years, would be $150." Two attorneys stated that the value of his services "over recent years is at least $140 per hour."

McCann & Livingstone, stated that he regarded Mr. Friedman as "the expert in fair housing discrimination cases." Basing his opinion on hourly legal rates in the Cleveland area, he stated that in a case that runs for a long time, the rate is "$200 an hour." He agreed that his firm was "not involved in fair housing litigation" and that it was his impression that "there are not many attorneys in that field."

Mark Wallach, a partner in the law firm of Calfee, Halter & Griswold, has knowledge of rates that are based on his knowledge of rates charged by his former and present law firms and his familiarity with bankruptcy court hourly rates. Based on today's rates, it was his opinion that a reasonable hourly rate for work in the housing area would fall within $20 of $150 per hour, either way, and one factor would be the risk of getting paid.

The attorneys' opinions, expressed in affidavits and testimony, all support Mr. Friedman's request that his reasonable hourly rate should be fixed at $140. Other evidence is also material. In the fair housing case of *Burns v. Celeste,* No. C79-1464, this court determined in October 1980 that Mr. Friedman's reasonable hourly rate was $80 for in-court time and $65 for out-of-court time. This court recognizes that *Burns v. Celeste* lacked the complex issues and protracted duration of the present case in which the trial alone lasted ten weeks. In another fair housing case, *Cooper v. Mutter,* No. C82-1339A, a district judge of this court awarded Mr. Friedman attorney fees in March 1984 based on the stipulation of the parties that a "fee of $125 per hour which plaintiff seeks in this case is reasonable." His hours totaled 79.5 hours, indicating that the case was neither complex nor lengthy.

Clearly the instant case has been one of great complexity. The issues which have been considered and de-

cided have been numerous and varied. Some were novel, and all generally difficult, partly because of the time taken to present the factual issues. Because of the complexity of this case, because of the risk factor that remained throughout the case's long duration, and considering all of the evidence bearing on the matter of a reasonable rate, this court fixes a reasonable hourly rate for Mr. Friedman's legal services of $140 for the years 1982 through 1985 and $130 per hour for the years 1978 through 1981.

(2)

Ms. Eloff asks the court to fix hourly rates of $45 for her services as a law clerk and $75 as an attorney. Other than Ms. Eloff's statements that these are reasonable rates, the only evidence that is relevant was developed in the examination of attorneys Mark Wallach and Fred J. Livingstone. Mr. Wallach testified that in 1981, once a first-year associate passed the Bar, the associate services were billed at $65 per hour. For a second-year associate in 1982, the rate would increase up to $10 per hour. Mr. Livingstone testified that in 1981 the services of a law clerk were billed at $35 to $40 per hour.

Upon the entire record, it is concluded that a reasonable rate for Ms. Eloff's services as a law clerk will be fixed at $40.00 per hour. A reasonable hourly rate for her services after she was admitted to the Ohio Bar will be fixed at $60 for 1981, $65 for 1982 and $75 for 1983.

II.

Hensley instructs that once the court determines the number of hours reasonably expended and a reasonable rate, the court must then evaluate "other considerations," which may lead to an upward or downward adjustment,

including the "important factor of the 'results obtained.'" 461 U.S. at 434. The *Hensley* Court set forth two questions that must be addressed in the situation "where a plaintiff is deemed 'prevailing' even though he succeeded on only some of his claims for relief:"

> First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Id. In the instant case, HCC did not succeed on all claims for relief but was deemed "prevailing," and therefore the court will address the above two questions to determine any adjustments based on the "results obtained."

A.

With respect to the first question posed above, defendants argue that plaintiff HCC should not recover fees for work on the class action claims because "such work was not done on behalf of HCC," and "the class-action plaintiffs did not prevail on such claims and the time spent on such claims is segregable." HCC, on the other hand, argues that the class certification process is not an "unrelated claim" because the class action claims had the same basis as the other claims and that the proof required for class certification involved proof of the underlying issues of the lawsuit.

The instant suit originally was brought by the white plaintiffs for themselves and as representatives of a subclass of white citizens of Cleveland Heights, by the black plaintiffs for themselves and as representatives of a subclass of black citizens, and by Heights Community Congress for itself and as a representative of "the class of

black and white persons as a whole." The complaint described the following total class as

> [a]ll black and white citizens who reside, would have resided or would seek to reside in Cleveland Heights in order to secure the benefits of a balanced and integrated living environment and who are otherwise deprived due to the racially resegregative activities of the defendants.

All of the individual plaintiffs except Sandra McGee were dismissed for lack of standing pursuant to the court's December 31, 1980 memorandum and order. HCC's standing was limited to pressing "a monetary claim to the extent of funds expended as a result of defendants' practices" and to joining "the city in its request for injunctive relief." It was specifically denied the right to "represent its members in bringing any monetary claims." Thus, by clear implication, HCC was denied standing to press any representative class action claims. The class action claim and the individual claim of the remaining individual plaintiff, Sandra McGee, were dismissed by stipulation on May 21, 1982.[15]

It is therefore clear that no plaintiff prevailed on any class claims nor did any individual plaintiff prevail on any individual claim. Although the underlying merits of the class claims on the merits may have overlapped with HCC's substantive claims, the court determines that the class certification issues were not related to the claims

---

15. This dismissal resulted from the earlier stipulation of December 23, 1981, which prescribed dismissal of Sandra McGee's individual and class claims if in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the Supreme Court should uphold the right of a community organization to bring a fair housing claim for organizational damages as it later did. Thus, all claims of the class and its remaining representative plaintiff were dismissed by May 21, 1981.

upon which HCC ultimately prevailed. *See Dillon v. AFBIC Development Corp.*, 597 F.2d 556, 564 (5th Cir. 1979). Moreover, work done toward obtaining class certification was not done on behalf of HCC but rather on behalf of Sandra McGee as a representative of a subclass of black citizens. *See Perkins v. Cross*, 728 F.2d 1099 (8th Cir. 1984). Thus, the court concludes that HCC may not recover attorneys' fees for any time its attorneys devoted to work on class certification.[16]

Hensley formulates a second question, which the district court must address in considering any adjustments based on "results obtained:" [D]id the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award? The *Hensley* Court later expands upon this "results obtained" factor by stating:

> Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. *The result is what matters.*

---

16. The court has excluded only segregable hours devoted to class certification work and not all possible hours spent on the class claims. In *Webb v. County Board of Education*, 715 F.2d 254, 259 (6th Cir. 1983), *aff'd*, 105 S.Ct. 1923 (1985), the Sixth Circuit upheld the inclusion of attorney time spent drafting class allegations in the complaint. (The Supreme Court's review of *Webb* was limited to the issue of the denial of fees for time spent on administrative hearings prior to filing suit. 105 S.Ct. at 1927 n.10.) In that case, "no class was ever certified and Webb obtained only individual relief pursuant to the settlement agreement." 715 F.2d at 259. The Sixth Circuit held that the "individual and class allegations are sufficiently related such that no reduction in fees is merited on this ground." *Id.* Similarly, the allegations here of HCC and the class representatives on the merits are sufficiently related so that depositions of class representatives or other joint work (except class certification services) will not be excluded.

Id. at 435 (emphasis added). Later, when referring to the situation where a plaintiff has achieved only partial success, the Court again emphasizes that the "most critical factor is the degree of success obtained." Summarizing, the *Hensley* Court states:

> Where a law suit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the *results obtained.*

Id. at 440 (emphasis added).

To measure plaintiff HCC's "level of success," this court must look at what HCC sought in bringing this suit and what it obtained. Alleging that defendants engaged in "racial steering and other racially discriminatory housing practices" in violation of the Fair Housing Act, plaintiffs' complaint requested relief in the form of a temporary restraining order and preliminary and permanent injunctions. Plaintiffs asked the court to enjoin defendants from activities which would interfere with equal housing opportunities and to order defendants to undertake an "Affirmative Fair Housing Program aimed at insuring full compliance with the goals, objectives and spirit of the Fair Housing Act." In addition, HCC and the individual plaintiffs sought $500,000 in damages (reduced to $35,000 by the stipulation of December 23, 1981).

This case went to trial on January 31, 1983 on Counts II and III of plaintiffs' complaint. The case was submitted to the court on June 17, 1983. In its memorandum and order of November 30, 1983, the court thus summarized its findings on Count II:

In sum, of the 25 incidents claimed by the plaintiffs to violate section 3604(a) through acts or statements, it has been found and determined that five agents of Hilltop engaged in eight violations of section 3604(a) that involved Cleveland Heights. Each of the acts or statements of these agents was made within the agent's course and scope of employment with Hilltop Realty, Inc. and, therefore, are imputed to Hilltop.

The eight incidents of making a dwelling unavailable because of race, committed by Hilltop agents, were not isolated incidents. They occurred in the successive years of 1976, 1977 and 1978 and demonstrate, as found in II.D., a corporate intent to continue to violate section 3604(a).

The racial steering claims against defendant sales agents Evelyn Gardner and Shirley Bernstein were dismissed. Previously, at the close of plaintiffs' case, the claims against defendant sales agents John Mayfield and Val Vrana were dismissed.

The court also found that out of the 16 instances of statements which plaintiffs claimed violated section 3604 (c), only one of those statements, previously found to be racial steering in violation of section 3604(a), also violated section 3604(c). In addition, on Count III the court found that Bruce Johanns violated section 3604(e) as to plaintiff City. However, the court determined that "the evidence does not show that the violation caused injury to HCC." Finally, the court concluded that Vincent Aveni was not liable for any violations and dismissed the claims against him.

Thus, the court found and declared that defendant Hilltop violated sections 3604(a) and (c), and that defen-

dants Hilltop and Johanns violated section 3604(e) as to plaintiff City. Nevertheless, the court also found no facts which would support a conclusion that there was a likelihood of a continuing violation or threat of future violations and therefore denied injunctive relief.

The court further determined in its November 30 opinion that HCC suffered "a type of general injury . . . which is sufficient to permit HCC to join with Cleveland Heights in seeking injunctive or declaratory relief, if otherwise justified." However, it was determined that HCC's "claim for monetary damages [was] not established."

Within a week after this court entered its 207-page memorandum and order deciding the merits of the case, Heights Community Congress and the City of Cleveland Heights on December 6, 1983 filed objections to and requested "modification of the relief portion of the proposed order of November 30, 1983." On December 7, 1983 the court overruled plaintiffs' request for modification.

Thereafter, plaintiffs moved on December 19, 1983, pursuant to Fed.R.Civ.P. 59(e), for the court to alter and modify its order of December 7, 1983 and to "enter an Order granting injunctive and related affirmative equitable relief and further granting to plaintiff Heights Community Congress monetary relief." As explained in its April 30, 1984 memorandum and order, and as journalized in this court's Rule 58 order of May 10, 1984, the judgment was "amended and modified, and One Dollar ($1.00) nominal damages [was] awarded Heights Community Congress against the defendant Hilltop Realty, Inc."

In part I of its memorandum and order of April 30, 1984, the court observed that the "general injury" found to have been suffered by HCC represented "an invasion

of HCC's legal right to engage in its open housing monitoring activities." The court awarded $1.00 nominal damages for this general injury, but the court did not alter its prior conclusion of November 30, 1983 that HCC did not prove any money, *i.e.*, actual damages. Thus, "the results obtained" as damages, that is, the $1.00 nominal damages, differed from and were less than the compensatory damages plaintiff HCC sought for "perceptive impairment" or "market share damages," but $1.00 more than the zero dollars which defendant Hilltop Realty believed HCC should have received.

Plaintiffs' modification request of December 6, 1983 included the request that

> plaintiff HCC and City of Cleveland Heights should be entitled to affirmative injunctive relief designed for purposes of monitoring and compliance with Fair Housing Act responsibilities.

Similarly, in plaintiffs' Rule 59(e) motion, filed December 19, 1983, plaintiffs urged this court "to enter an Order granting injunctive and related affirmative equitable relief." Plaintiffs devoted 22 pages of its 27-page brief of December 19, 1983 to its request for injunctive and affirmative relief. Thereafter, on March 8, 1984, Heights Community Congress filed its reply brief in which it again extensively argued for injunctive and affirmative relief. Thus, plaintiff Heights Community Congress, by its vigorous efforts to modify this court's order of November 30, 1983 in order to obtain injunctive and affirmative relief, demonstrated the great importance which Heights Community Congress attached to this requested relief.

Recognizing the importance and seriousness of plaintiff HCC's request for modification of the judgment to obtain injunctive and affirmative relief, part II of this court's

22-page memorandum and order on April 30, 1984, pages 7-20, related to this request. Yet, the court concluded, "Upon the reasons and grounds stated, and after due reconsideration, the court reaffirms its conclusion that the plaintiffs have not established a basis upon which this court should at this time grant injunctive relief."

In assessing plaintiff HCC's "level of success," this court considers the great importance which plaintiff HCC attached to the injunctive and affirmative relief, which it did not obtain. Also, the court must consider the relief which plaintiff HCC unsuccessfully sought to obtain against defendant Vincent Aveni, president and chief executive officer of Hilltop Realty, and against the individual defendants who were Hilltop sales agents.

Although HCC was unsuccessful in obtaining mandatory and affirmative injunctive relief against defendant Hilltop and the individual defendants, relief which was important to HCC, it does not mean that the declaratory relief granted to plaintiff HCC lacked significance. In her brief of April 26, 1985, Ms. Eloff argues that "[t]he declaratory relief was, of course, the most significant." The declaratory relief that was granted will be put in perspective. As this court observed in its "prevailing party" memorandum and order of January 2, 1985, the declaratory relief and nominal damages which plaintiff HCC obtained, "achieved a vindication of plaintiff HCC's rights under the Fair Housing Act." Further, "when real estate agents and brokers violate the Fair Housing Act rights of citizens and the court so declares, there is an important deterrent effect on other real estate agents and brokers."

In this court's memorandum and order of April 30, 1984, the court considered the argument of the United

States that "a mere declaration of law, as applied to Hilltop's conduct here, will provide the defendant with little more than a reminder of what it knew or should have known when it commenced its intentional violations as found by this court." This court thus responded:

> Entitled to injunctive relief depends not on the alleged inadequacy of a remedy of declaratory judgment but rather upon a finding "that there exists some cognizable danger of recurrent violations." *United States v. Warick Mobile Homes Estates*, 558 F.2d at 197.

After quoting from 28 U.S.C. §2202 and from relevant cases relating to declaratory relief, this court then observed in part:

> Should the defendants engage in further conduct which constitutes a violation of the Fair Housing Act and the plaintiffs file a supplemental claim to that effect, this court, pursuant to section 2202, is obliged to entertain and determine whether that has occurred.

Reflecting this conclusion in its Rule 58 order filed May 10, 1984, the court declared "that this court's jurisdiction and authority under 28 U.S.C. §2202 is continuing."

In support of her argument as to the significance of declaratory relief, Ms. Eloff points to the following specific litigated issues in her brief of April 26, 1985:

> Plaintiffs sought and received guidance with regard to all litigated issues, from the broad 42 U.S.C. §3604 claims to the specific types of evidence offered in support of those claims. The HUD audit format was validated. The law relating to unlawful remarks and solicitation of home sales was clarified.

Hensley held that "'given the unrelated nature of the facts and legal theories in this case, the District Court did not err in refusing to apportion the fee award mechanically on the basis of respondent's success or failure on particular issues." 461 U.S. 424, 438. Similarly, in this case, rulings in favor of plaintiff HCC on the "issue of vicarious liability of a broker for the acts of his agent," or on the issue of the "HUD audit format" are considered as part of, but not separate from, the general subject of declaratory relief in determining HCC's "level of success."[17]

Ms. Eloff further argues that this court's decision is important to others in the fair housing field:

> The massive Memorandum and Order of December 7, 1983 provides detailed guidance not just to the parties, but to all others involved in fair housing activities, as attested by the hearing testimony of Kermit Lynn, formerly of the Cuyahoga Plan.

With respect to "others involved in fair housing activities," the court previously noted the deterrent effect of the court's declaratory relief. Whether or not "others involved in fair housing activities" accept or reject the court's memorandum and order of November 30, 1983, as modified on April 30, 1984, as "detailed guidance," indicates public reaction to the relief granted and denied by this court to plaintiff HCC. But public reaction to the relief granted or denied must be distinguished from the relief itself. Yet, it is the relief itself, granted or denied, that measures

---

17. This court did declare that "[n]one of the eight incidents is barred by the 180-day period of liimtations of 42 U.S.C. §3612(a), see part IV., pp. 188-89." But obtaining a favorable ruling on that issue did not constitute an award of relief. Had the court not so ruled on the statute of limitations issue, plaintiff HCC would not have prevailed. Therefore, that ruling may not be considered in determining plaintiff HCC's "level of success."

the "results obtained" and the "level of success," as this court understands and has applied *Hensley*.

Assessing the "results obtained" with respect to both the relief granted and denied to plaintiff HCC, this court concludes and it is determined that plaintiff Heights Community Congress did not achieve a level of success which "makes the hours reasonably expended a satisfactory basis for making [the] fee award." *Hensley*, 461 U.S. at 434. Rather, that amount would be excessive and will be reduced by 45 percent.

III.

Based on the foregoing, and as detailed in Appendices A and B [omitted herein], the court determines the following final amounts. Heights Community Congress is awarded $81,978 for its attorney Avery S. Friedman, and $39,663 for its attorney Kathryn Gonser Eloff, for a total of $121,641.

IT IS SO ORDERED.

/s/ WILLIAM K. THOMAS
U.S. District Senior Judge

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed November 30, 1983)

No. C79-422

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

HEIGHTS COMMUNITY CONGRESS, *et al.*,
Plaintiffs,

v.

HILLTOP REALTY, INC., *et al.*,
Defendants.

MEMORANDUM AND ORDER

THOMAS, *Senior Judge*

Tried to this court, the action of plaintiffs Heights Community Congress (also HCC or the Congress) and the City of Cleveland Heights (also City or Cleveland Heights) is based on Title VIII of the Civil Rights Act of 1968, otherwise known as the Fair Housing Act, section 801 *et seq.*, 42 U.S.C. §3601, *et seq.* (1977). Plaintiffs assert claims against Hilltop Realty, Inc. (now known as HGM/Hilltop), its president and certain sales agents.

Plaintiffs allege that Heights Community Congress, a not-for-profit corporation organized under the laws of the State of Ohio, seeks to promote and maintain Cleveland Heights as an open and integrated community, and has "endeavored to achieve this objective through the processes

of education, negotiation, publication, community organization and litigation." Plaintiffs further allege that the City of Cleveland Heights is a municipal corporation organized and existing under the laws of the State of Ohio. Plaintiff City seeks to continue to be a stable, integrated community, without resegregation in any part, for the benefit of its residents and all those who choose to live there. The City has expended substantial monies, primarily through federal grants, on programs designed and implemented to accomplish these objectives.

The case proceeded to trial on Counts II and III of the plaintiffs' complaint.[1]

In their second cause of action, plaintiffs allege:

> Plaintiff Heights Community Congress has monitored the activities of the defendants since 1973 and found a pattern and practice of racially discriminatory housing practices by the defendants including locational steering by race, racial remarks, racial disparity in financing, racial differentiation in treatment and racially inconsistent advertising.

In prosecuting this cause of action, plaintiffs charge defendants Hilltop, Vincent T. Aveni, John Mayfield, Evelyn

---

1. In their first cause of action, plaintiffs alleged that defendant Hilltop Realty was a party to a consent decree in the United States District Court for the Northern District of Ohio which required specific affirmative fair housing activities. It was alleged that notwithstanding this 1973 decree, defendants and their agents "contributed to the erosion, interference and obstruction of integrated housing opportunities by the defendants' failure to abide by their affirmative fair housing duties." Immediately before the start of trial, the court on January 26, 1983 granted the motion of defendants Hilltop Realty, Inc. and Vincent Aveni to exclude "evidence of alleged violations of the 1973 - 76 consent decree," the subject of Count I. By stipulations of December 3, 1981 and May 21, 1982, all remaining class action claims of Count IV were dismissed.

Gardner and Shirley Bernstein with violations of 42 U.S.C. §3604(a) and (c).

In the third cause of action, plaintiffs assert unlawful discriminatory housing practices against sales agents of the defendant Hilltop Realty, noting among other things that within six months of the filing of the complaint "two (2) of defendant's agents have been convicted in the Cleveland Heights Municipal Court of violations of the City's anti-solicitation ordinance." In prosecuting this cause of action, plaintiffs charge a violation of 42 U.S.C. §3604(e) against defendants Val Vrana and Bruce Jonanns.

The defendants generally deny the allegations of plaintiffs in the second and third causes of action. In addition, defendants continue to assert that neither the City nor Heights Community Congress has established the necessary elements of standing to assert their claims in this action. The defendants further assert that both the City and HCC have failed to establish a causal relationship between alleged conduct of defendants and any alleged injuries.

After a 12-week trial, counsel submitted post-trial briefs and argued the case orally on June 17, 1983. Thereupon, the case was submitted to the court for decision.

I. BACKGROUND

A. Cleveland Heights

Plaintiff City of Cleveland Heights is a municipal corporation organized and existing under the laws of the State of Ohio and was chartered in 1921. The City is contiguous to Cleveland on the west, East Cleveland and Cleveland on the north, South Euclid and University Heights on the ast, and Shaker Hights on the South. The

City's government includes a council, a council-elected mayor and a council-appointed city manager.

Professor Oliver Schroeder[2] testified as to the diversity of the City. He described Cleveland Heights as a "built-up community" of used homes with a wide variety of styles and with house prices ranging from $30,000 to $250,000. Professor Schroeder observed that Cleveland Heights has "unique citizens," *e.g.*, "45 percent of the Cleveland Orchestra live in Cleveland Heights." The City is "heavily professional," and among its residents are employees of the Cleveland Clinic and University Hospitals. The City has a broad religious make-up, including a "strong Jewish population," a "sizeable Catholic population," and "strong Protestant churches."

Professor Schroeder described two home bombings in Cleveland Heights that were related to race. In October 1965, a house near Euclid Heights Boulevard was bombed. It was the home "in which the new director of the Karamu Theater, a black man and his family, had moved in." The mayor and council issued a proclamation. As its author, Professor Schroeder remembers that the proclamation declared that the community was an open community, that any individuals who wished to conduct themselves in an orderly manner could buy in Cleveland Heights, and that all of the forces of police investigation would be used to prohibit "this kind of violation occurring in the community."

While Professor Schroeder was mayor in 1972, a home on Brinkmore in the northeast section of Cleveland Heights,

---

2. Oliver Schroeder, professor of law at Case Western Reserve University Law School, was elected to three four-year council terms after filling a council vacancy in 1965. From 1972 to 1974 he served as mayor and president of council. Since 1980 he has served on the housing board.

owned by a black family, was bombed. When the bombing occurred, the mayor visited Mrs. Appling's home and viewed the destruction. He reported:

> I assured her that just because she was black, this should never have happened, that we wanted her as a citizen and a resident of Cleveland Heights, and we hoped that we could help her get her home restored.

A meeting of residents of the street was organized, which the mayor attended. He recommended that the residents create a street club to "give themselves protection and to build up an esprit de corps for their street and for their neighborhood that would continue to make it a very worthwhile place in which to live."

The change in demographics in Cleveland Heights in the decade 1970-1980 is demonstrated in the evidence. According to the United States census, Cleveland Heights had a population in 1970 of 57,767 and in 1980 a population of 56,438. In 1970, the census percentage of black residents in Cleveland Heights was 2.5 percent. By 1980, the census showed that the percentage of blacks in Cleveland Heights had grown to 24.9 percent (other minorities comprised an additional 2.1 percent).[3]

Census data for the 17 census tracts within the City reveal that in 1970 census tracts 1401 and 1405 each had

---

3. All parties refer to Cleveland Heights as integrated. Social statistician Edward McNeeley of the Cuyahoga Plan was asked if there is "any agreed-upon definition as to what constitutes integration?" He answered: "Not a numeric definition, no." He attempted to give what he thought he meant in the Cuyahoga Plan reports when the term "integration" was used. His formulation is not applicable here. Instead, for purposes of this lawsuit when the term "integrated" is used or forms a basis of racial composition, comparison of communities, census tracts, or neighborhoods, the term will be understood to mean approximately the 1980 black population of Cleveland Heights, or 24.9 percent.

zero percent black. The remaining 15 tracts ranged from a low of .5 percent black in census tract 1402, to 9.0 percent in census tract 1406. Census data for 1980 show a black population in each of the 17 census tracts. However, as the court noted in its March 17, 1983 memorandum and order, using the average black population for the City "conceals substantially higher non-white percentages in certain areas of the city." Census tract 1413 had a black population of 5.8 percent, while census tract 1403 had a black population of 53.7 percent. Breaking the census tracts into two groups, eight range from 5.8 percent black to 15.9 percent black, and nine census tracts range from 24.0 percent black to 53.7 percent black, as the chart in the margin illustrates.[4]

Adjacent to Cleveland Heights, to the north, the city of East Cleveland experienced a dramatic rise in the black population in the late sixties. The 1970 census showed the black population at 58.6 percent. By 1980 the census showed a black population increase to 86.5 percent. This

---

4.

Census Tract	Percent Black	
	1980	1970
1413	5.8	2.7
1412	8.1	2.2
1411	8.5	2.0
1414	9.5	1.5
1415	9.5	1.4
1405	10.3	0.0
1417	15.5	1.6
1404	15.9	.6
1408	24.0	3.2
1401	29.1	0.0
1416	30.9	3.3
1410	33.6	4.0
1402	34.8	.5
1406	38.0	9.0
1409	42.2	4.2
1407	43.1	6.5
1403	53.7	.7

Source: U.S. census data

percentage indicates that overall, East Cleveland has become resegregated.[5]

Cleveland Heights census tract 1403 is 53.7 percent black, the highest concentration of blacks in a Cleveland Heights tract. It rose from .7 percent in 1970. Tract 1403 is adjacent to East Cleveland census tract 1502, which had an increase in its black population from 10.4 percent in 1970 to 65.3 percent in 1980. It is interesting to note that within Cleveland Heights tract 1403 there also is an ascertainable housing pattern. Within tract 1403, census block group 2 is 12 percent black according to 1980 census data. Block group 2 is located in the southeast corner of 1403 and at the point farthest away from East Cleveland Moving toward East Cleveland, the next census block group is block group 1. Its population is 39.5 percent black. Successively closer to East Cleveland the percentages of blacks in block groups 3, 4, 6 and 5 are 55, 80, 80, and 67, respectively.

Social statistician Edward J. McNeeley of the Cuyahoga Plan of Ohio, Inc.,[6] was asked on cross-examination

---

5. "Resegregation" does not have a precise definition. Mr. McNeeley testified that the Cuyahoga Plan uses the term to mean "a process of one racial group replacing another" if the change is "a rapid racial change." This court uses the term in this memorandum to broadly mean a process of one racial group replacing another.

6. Mr. McNeeley has helped coordinate research and planning in the Cuyahoga Plan's "continuous demographic study of the racial composition of [Cuyahoga County] neighborhoods and communities." Three editions of the "Report on Population and Race Estimates of the Racial Composition of Census Tracts," published in 1979, 1980 and 1981 are in evidence.

Although census data on racial composition of Cleveland Heights by census tract are not avialable for the years in between 1970 and 1980, the data compiled from Cuyahoga Plan studies give some indication of changes in the non-white population for years 1970, 1973, 1975, 1976, 1977, 1978, 1979 and

(Continued on following page)

by counsel for defendants, "Now, again, looking at Cleveland Heights figures as a whole, if we look at the figures from 1970 in your first report, which goes, I believe to '77, and in your last report which takes it to 1980, is it fair to say that the greatest rate of change in the non-white minority population was in the early part of the decade, the first part of the decade, '70 - '75?" Mr. McNeeley answered, "I would say until '76 but, yes." Answering a follow-up question as to whether this rate of change "lessened substantially" in the period '76 - '80, Mr. Neeley answered, "in most of the census tracts."

Professor Schroeder described action taken by the Cleveland Heights City Council to meet problems relating to race and housing. The first problem concerned real estate solicitation in the years 1966 and 1967. He recalled that on a particular street, "all of a sudden over a weekend, 19 for sale signs came up on the street, which had about 35 or 40 homes on it." At a street club meeting he learned that "the whole street had been solicited and urged to put their homes up for sale." The solicitation had been by real estate companies. Hilltop was not one of them.

In 1967 City Council adopted an emergency ordinance which addressed "the problems created by racial discriminations in the real estate area," according to Professor Schroeder. This ordinance forbade for sale signs on private residences. This ban became part of the 1970 zoning ordinance.

Footnote continued—

1980. The Cuyahoga Plan methodology uses a formula based on birth and death records, which are reported by race and census tract. Mr. McNeeley testified that when estimates made from the Cuyahoga Plan methodology were compared with census data, the Plan estimates were within five percent of the census data over 80 percent of the time for 1970 and 1980 for all census tracts in the County.

Professor Schroeder stated that in 1972, while he was mayor, "there was a tremendous influx of telephone solicitations in several areas." One area was the northeast Oxford area where the Brinkmore bombing occurred, and another was east of Lee Road between Mayfield and Cedar Roads. Many of the street club representatives came to Council and demanded that it stop the telephone solicitation. Council responded by passing an emergency anti-telephone soliciation ordinance which put the burden on the citizens: "If you don't want to be called, you sign this card. Your name will go on the no-call list and you will not be solicited."[7] At the six-month expiration of the emergency anti-solicitation ordinance, a voluntary PAL program was instituted. The program provided a listing of "preferred" agents who the City would advertise as "the people to see if you desire to live or buy a home in Cleveland Heights." In return, the agent would take a training course on the benefits of Cleveland Heights and agree not to solicit. The voluntary plan "worked modestly."

City Council in 1976 adopted Resolution No. 26-1976 and Ordinance No. 27-1976. Resolution No. 26-1976 established the components of a comprehensive real estate program. One component was the preferred agent program, and another was expanded community and public relations. The resolution also established a Financial Institution Advisory Committee (FIAC) and provided for cooperation with other municipalities and organizations in the county area "seeking to open up all of the Cuyahoga County to open housing, completely free market."

---

7. Black real estate people asserted that other than through solicitations, they had no way of getting listings. They complained that the white real estate agents and firms were already in place and had the opportunity to get listings.

Ordinance No. 27-1976, still in force, prohibits discrimination in housing, block busting, and real estate steering. Home soliciations are barred if the homeowner has filed a written notice not to be solicited. The ordinance also provides for the establishment of the Cleveland Heights Housing Board to monitor the operation of the ordinance. The ordinance further provides misdemeanor penalties for persons who violate the various prohibitions.

Mrs. Barbara Roderick[8] became housing coordinator for Cleveland Heights in November 1970. Her major responsibility was to assist in organizing street clubs and neighborhood meetings, to receive complaints from residents, and to try to reduce anxiety associated with black families moving into Cleveland Heights. Her office also worked with the real estate brokers who were most active in Cleveland Heights to "create a stable real estate market and not a panicked one."

After the adoption of the resolution and ordinance, Mrs. Roderick, in April 1976, assumed the title of Commissioner of Real Estate Programs. She supervised the Housing Service "to establish . . . a Preferred Agents Program, to work with the industry and [to] work with residents around real estate issues." In November 1979 Mrs. Roderick ended her Cleveland Heights employment to engage in private business.

---

8. Mrs. Roderick, M.S.S.A., School of Applied Social Sciences of Case Western Reserve University, in 1964 began to work in the field of fair (open) housing. In 1968 the N. Taylor Road office of Isaac Haggins, the first black real estate broker to open an office in Cleveland Heights, was bombed. Six or eight months later, Mrs. Roderick was employed by Mr. Haggins "in his efforts to see if a black broker could become a part of the mainstream of the real estate industry." Her work was primarily to make community contacts to assist the black broker in securing "listings in white neighborhoods in order to increase opportunities for black buyers."

The foregoing summary of evidence demonstrates the City's affirmative efforts to maintain Cleveland Heights as an open, stable, integrated community and to prevent resegregation.

B. Heights Community Congress

In 1972 a group of women members of St. Ann's Roman Catholic Parish in Cleveland Heights became interested in housing patterns in Cleveland Heights and other suburbs. They formed the St. Ann's Social Action Housing Committee. After receiving instruction from Dr. Julia Saltman, see *infra* pp. 19-20 [A63-4], the committee performed an audit of ten real estate firms, including Hilltop Realty, between June and August 1972.

The Housing Committee prepared a written report and made oral reports to the city councils of Cleveland Heights and Shaker Heights. A copy of the report of the audit was sent on September 1, 1972 to Vincent T. Aveni, president, Cleveland Area Board of Realtors (CABOR), indicating that it was a "Real Estate Audit in the eastern suburbs of Cleveland." Subsequently, representatives of the St. Anne's Social Action Housing Committee met with Mr. Aveni.[9]

---

9. On October 2, 1972, Almon R. Smith, executive vice president of the Cleveland Area Board of Realtors, released a "statement on recent St. Ann's report and open housing in general." Among other things, a news release stated:

> A housing group from St. Ann's in the Heights area did an extensive and exhaustive study and made its report known to all of the news media before they even made it known to the people involved. In addition to that, they further complicated the entire matter by refusing to even name the companies which they had used as their test companies.

The St. Ann's audit report has not been received in evidence, and none of the auditors appeared as witnesses in the trial.

(Continued on following page)

Formed in the last months of 1972, a group called the Housing Task Force became the Housing Task Force of the Heights Community Congress. The latter organization was formally chartered as an Ohio corporation not for profit on January 4, 1973. As stated in the HCC's code of regulations:

> The Heights Community Congress is a non-partisan coalition of religious, civic, educational, neighborhood and community organizations in the Cleveland Heights, University Heights area and representatives of city government, with a common objective of promoting and maintaining an open and integrated community of the highest quality.

Membership in the corporation includes designated classes of membership and neighborhood organizations.[10]

Activities of the Congress are primarily carried on through 13 task forces. Only the activities of the Housing

---

Footnote continued—

Although questions concerning its content were not permitted, the court permitted examination of Mrs. Nigro and Mr. Aveni, as president of CABOR, about their discussion of the report. Testimony was taken, not for the content of the discussion, but "for purposes of claiming notice." This notice could only be general since neither Hilltop or other firms were identified.

10. Each class and each neighborhood organization is entitled to one trustee on the board of trustees. Among the 14 classes are the Government Class, the School Board-Library Board Class, the Catholic Organizations Class, the Jewish Organizations Class, the Protestant Organizations Class, the Independent Religious Organization Class, the Business Class, the Merchants Association Class, the Civic Organizations Class, the School Affiliated Organizations Class, the Youth Representative Class, the Black Citizens Class, the Women's Rights Class, and the Senior Adult Class. Neighborhood organizations serve residents in the ten geographical areas of Cleveland Heights according to original elementary school district boundaries (Boulevard, Caledonia, Canterbury, Coventry, Fairfax, Millikin, Noble, Oxford, Roxboro, and Taylor).

and Open Housing Task Force are of relevance in this case.

By agreement dated May 30, 1974, the City engaged the Congress to provide a "Heights housing service" for a period of six months beginning June 1, 1974 for stipulated monthly payments. Pursuant to this agreement, the "Heights Housing Service" was established to escort prospects throughout the entire City before looking at specific homes for purchase, to assist buyers and sellers with their housing needs, and to "promote an open community whereby access to housing will be available to all home seekers in the total city." As part of the comprehensive program established by Resolution No. 26-1976, the City took over the Heights Housing Service in June 1976. Thereafter, the City administered the escort service.[11]

The Open Housing Task Force performed an audit of Hilltop and other firms from approximately July through September 1973 under the direction of Susan Nigro.[12] After the results were compiled and a report was

---

11. To further carry out the "comprehensive program," the City and the Congress entered into an agreement on May 1, 1976 by which, among other things, the Congress agreed to continue research into the "mortgage loan practices of financial institutions" for specified years, and the Congress agreed to assist the City "in monitoring the effect of the Preferred Agents program and monitoring such other aspects of the Housing Delivery System as the City Manager may direct from time to time." Effective December 13, 1976, the parties agreed to specified changes in the services to be performed by the Congress and the payments to be made by the City.

12. These results were not received in evidence and the checkers were not called as witnesses. However, Mrs. Nigro was permitted to testify that she reported the audit results to Mr. Aveni on April 25, 1974. In part she stated:

> The next thing I remember him saying is that, you know, he was really trying to do a good job, and he would take care of whatever things had happened during this audit.
>
> We told him the names of those agents and what we had found, and he said, "I will take care of it."

prepared, representatives of HCC met with the City to discuss the results.

Charles H. "Chip" Bromley started to work for HCC in mid-1973 as a community organizer. After Mrs. Nigro shifted her duties from the Open Housing Task Force to organizing and directing the Heights Housing Service, Mr. Bromley became the HCC staff person working with the Open Housing Task Force. Under Mr. Bromley's direction, real estate firms who were members of the exclusive multiple listing exchange and parties to the U.S. District Court consent decree, see *supra* note 1, were audited in the summer of 1975. Based on the results of the audit, Mr. Bromley prepared a report and recommendations which were submitted to the City in late 1975 or early 1976. He noted that some of the written recommendations to the City were embodied in the comprehensive housing program legislation.

Under HCC's May 1976 contract with the City to monitor real estate practices in the City of Cleveland Heights, see *supra* note 11, the Open Housing Task Force conducted an audit of Hilltop and seven other real estate companies in August 1976.[13]

The Open Housing Task Force completed another audit of fair housing practices in Cleveland Heights in July 1977, as evidenced by letters of September 15, 1977 and February 16, 1978 to checkers from the chairperson of the Open Housing Task Force. Within the limited purpose

---

13. In the fall of 1976, the Open Housing Task Force prepared a report of the 1976 audits. The report compared the activities of PAL and non-PAL real estate agents (13 agents in all, seven companies). The report made several recommendations to the Housing Board of the City, including the recommendation that the Board should follow up vigorously with individual agents whom the Housing Task Force felt had violated the fair housing law.

for which this letter was received in evidence, the letter records that "[n]ineteen real estate companies (31 completed agent checks) were audited between April and December 1977."

Pursuant to Resolution No. 16-1976, which provided for a "study to be conducted by the City of the availability of housing within the community and other aspects of the housing delivery system within the community," the City entered an agreement with HCC on February 24, 1978. For the fee of $9,500 the Congress agreed to "complete a minimum of sixty (60) housing survey checks, said checks to be made by matched pairs of white and black personnel." The Congress further agreed to "work under the direction and supervision of Juliet Saltman, Ph.D. a consultant under contract to the City."

Dr. Saltman had served as a consultant[14] with the HUD National Audit of Housing Opportunity. Dr. Saltman explained that the HUD audit was "designed to measure the extent of equal housing opportunity in the country as a way of determining the impact of the fair housing law" and not "for litigation, per se."[15]

---

14. As a consultant to the National Audit, Dr. Saltman performed several services. She wrote the manual for checkers and assisted in the design and preparation of the forms for supervisors. During the 1977 National Audit, which ended in June 1977, she served as regional coordinator for the north central region of the country (eight metropolitan areas in Ohio, Tennessee and Kentucky). She was responsible for the training in each of these areas and the preparation all of the materials.

15. Dr. Saltman differentiated audit types. She explained that the purpose of the HUD-type audit is to measure the equality of treatment in the actual real estate market, as to be determined by broker practices rather than individual agent practices.

Asked why she believed this to be a fair and accurate method of determining difference in treatment or discrimination as it relates to a broker's office, she answered:

(Continued on following page)

Dr. Saltman agreed that the "gist or the premise of the methodology used in the HUD audit" is thus correctly stated in the audit executive summary entitled "Measuring Racial Discrimination in American Housing Markets:"

> Two individuals of the same sex are matched as closely as possible in terms of age, general appearance, income and family size; that is, in every relative way except skin color. The two individuals request identical housing and carefully record their respective experiences on standardized reporting forms. The quantity and quality of information and service provided to each are then compared and any systematic difference in treatment accorded black auditors and white auditors is presumed to be because of race.

Asked if the black and white checkers should have similar educational background, Dr. Saltman stated "only commensurate with their occupational status." However,

---

Footnote continued—

> Because that is really the only way you can measure what is occurring in the true market.
>
> Most people, when they are looking for houses, do not go back to the same agent. Most people deal with a company or various companies. If you wish to measure the treatment of companies, you have to measure the companies rather than the individual agents.

In a single-agent audit where both checkers evaluate the same agent, she agreed that the characteristics are the same as in the HUD-type audit. She considered it a fair and accurate method of determining whether discrimination takes place by that particular agent as far as housing practices go.

On cross-examination she was asked:

> Now, if there is a difference in treatment by two different agents, that is, where the agent is not identical, then logically couldn't some of those differences in treatment be attributable to the difference in the agent rather than race? Yes or no?

She answered, "If that is what you are testing." She then added, "If you're not testing that, then it is irrelevant."

the "size of housing" and "the area preferred" both "had to be the same." However, the checkers were instructed not to use exactly the same words in giving "the area preferred."[16] She agreed that the "price range also had to be identical." The "down-payment" is not to be identical but "had to mean the same things." Dr. Saltman agreed that the purpose of making these factors "identical between the black and the white checker was so that you could determine whether the difference in treatment was then attributable to race."

This court concludes that the HUD-type audit, used nationally in 1977 and employed in the Cleveland Heights 1978 spring audit, is a generally valid method of detecting disparate treatment of prospective home owners based on race. However, as one of its specifications, the audit methodology limits the number of homes shown that the checker must report in the audit form to three, although she may have been offered or shown more by the agent. Three home showings before a purchase is not reflective of the experience of the large majority of actual home buyers called as witnesses by both plaintiffs and the defendants.[17] Hence, in evaluating each audit, the court has taken into account any homes in excess of three that were offered to be shown by an agent to a particular checker.

---

16. Dr. Saltman, who trained the spring audit supervisors, described the nature of the checker training as consisting of the reading of the checker's manual, group training sessions, including the study of forms used, practice in role playing, and two practice audits conducted in the field.

17. Among the three actual home buyers called by the plaintiffs, the number of showings ranged from 10 to at least 45. Among the 22 actual home buyers called as witnesses by the defendants, three purchased a home after three or fewer showings; fourteen were shown six to 16 homes; three saw 17 to 27 homes; one saw 33 homes; and one saw somewhere between 30 and 40 homes.

During the 1978 spring audits, 35 randomly selected real estate companies were audited in 60 office visits by the 14 checkers (seven black, seven white, all female) from Tuesday, April 4 through Saturday, April 8, and from Monday, April 10 through Friday, April 14. Company real estate sales agents showed homes to the checkers by following up on the office visits. Each checker was directed to limit home showings reported in the audit to three. The seven black checkers and the seven white checkers formed seven pairs, with each counterpart checker auditing the same company. After the white checker had visited the real estate company office, the black checker was to complete her separate audit within 24 hours of the white checker's audit.

Each checker completed a multiple choice audit report, a narrative statement, and a supplementary report immediately after the audit. No more than three homes shown to the checker were reported in the audit form. The checkers took the completed forms to the office of the Heights Community Congress where the audit supervisors reviewed the forms. The supervisors made their determinations with reference to the presence or absence of differences of treatment between the black and white checkers.

With respect to the spring 1978 audits, Dr. Saltman "analyzed the summaries, examined some of the individual audits, and went over the evaluation of the supervisors of the audits in reaching conclusions which are contained in [her 70-page report submitted to the City]." On grounds stated by the court, but which need not be repeated here, the court ruled that the report was inadmissible.

In conducting the fall 1978 audits, HCC acted independently of the City. From October 18 through October

21 and from October 24 through October 28, 1978, eight checkers (four black, four white, all female) completed audits of 17 real estate companies, including Hilltop Realty. Later, on November 19, open house audits of particular agents were conducted.

Except for the inclusion of some individual agent audits, the fall audits followed the methodology of the 1978 spring audit. The spring 1978 auditor's manual was given to the checkers to read, and other training procedures used in the spring were followed in the fall. At the conclusion of each audit, the checker filled out the auditor's report form and turned it in to a supervisor for review and evaluation. It is determined that HCC applied the HUD-style methodology found to be generally valid by this court.

Based on the results of the spring and fall audits, the HCC requested that the City join it in filing a law suit against Hilltop. The city manager and law director made the decision to file the lawsuit after the City had been told by HCC the results of the fall 1978 series of audits.

C. Hilltop Realty

Hilltop Realty, Incorporated, an Ohio corporation for profit, incorporated in 1953, now carries on its business as "HGM/Hilltop." Its principal office is in the Hilltop building in Lyndhurst, Ohio. The Lyndhurst or Hillcrest office of Hilltop is also located in the same building. At times relevant to the events of this law suit, Hilltop maintained a Cleveland Heights office at Mayfield Road and Warrensville Center Road. This office was closed in 1980. Hilltop has offices in other communities in the eastern suburbs of Cleveland.

II. ALLEGED SECTION 3604(a) VIOLATIONS

A. The Law

Racial steering, while not specifically mentioned in the Act, is proscribed by that portion of 3604(a) which makes it unlawful to "otherwise make unavailable or deny a dwelling to any person because of race. . . ." *United States v. Mitchell,* 580 F.2d 789 (5th Cir. 1978); *Zuch v. Hussey,* 394 F.Supp. 1028 (E.D. Mich. 1975), *aff'd and remanded,* 547 F.2d 1168 (6th Cir. 1977).

Unlawful racial steering was defined in *Zuch* as follows:

> the use of a word or phrase or action by a real estate broker or salesperson which is *intended* to influence the choice of a prospective property buyer on a racial basis. [Emphasis added.]

Zuch, 394 F.Supp. at 1047. Under this definition, intent to steer must be shown to prove unlawful racial steering. *United States v. Welles-Bowen Co.,* Equal Opportunity in Housing (P-8), ¶15,314, at 15,762 (N.D. Ohio 1979) (citing *Zuch*), *aff'd,* 673 F.2d 1331 (6th Cir. 1981).

Courts have held that if there is proof of significant "discriminatory effect," then this may be sufficient to show a violation of the Fair Housing Act, even without direct proof of discriminatory intent. *Mitchell,* 580 F.2d at 791; *United States v. City of Parma, Ohio,* 494 F.Supp. 1049 (N.D. Ohio 1980); *aff'd in relevant part,* 661 F.2d 562 (6th Cir. 1981), *cert. denied,* 456 U.S. 926 (1982). The statistical evidence presented in this case is not sufficient to permit a finding of "significant discriminatory effect."

Therefore, in the instant case plaintiffs must show intent to racially steer.[18]

It is not necessary for the steering to be successful in order for the Act to violate section 3604(a), for attempts to steer are also proscribed. *Zuch*, 394 F.Supp. at 1048. In *Zuch*, the court held:

> The fact that the defendants did not succeed in steering the plaintiffs away from the transitional neighborhoods of Detroit is not relevant; the law makes it unlawful even to attempt. *Smith v. Sol D. Adler Realty*, 436 F.2d 344, 349-50 (7th Cir. 1971). . .; *Brown v. State Realty Company*, 304 F.Supp. 1236, 1241 (N.D. Ga. 1969). . . . Were it otherwise, the damage to be done by steering would have to be inflicted first before the actions could be challenged. Such a requirement would fail to serve the purpose of the Act.

Id. Furthermore, the test used to determine whether a statement constitutes racial steering in violation of section 3604(a) is not the effect of the racial statement on the hearer of the statement, but rather the effect the statement would have if heard by a reasonable person under the circumstances who is seeking housing.

A broker may be held liable for the racial steering of its agents. If an individual sales agent engages in an act of racial steering, and if that act or statement

---

18. Similarly, in *Chicago Heights v. Arquilla-DeHaan Realtors, Inc.*, No. 77-C3305 (N.D. Ill. May 21, 1980), *aff'd*, 80-1853 (7th Cir. 1981), the court focused "its attention on evidence of purpose and intent, since the plaintiffs had not shown that any discriminatory impact resulted from defendants' alleged conduct." See also *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

is made within the sales agent's course and scope of employment with a real estate broker, it may be imputed to the broker. *Marr v. Rife,* 503 F.2d 735, 740-42 (6th Cir. 1974); *Northside Realty Assoc., Inc. v. United States,* 605 F.2d 1348, 1354 (5th Cir. 1979).

In their post-trial brief, plaintiffs support their second cause of action, which alleges "a pattern and practice of racially discriminatory housing practices by the defendants, including locational steering by race," by relying on cases which have construed the Attorney General's right under section 3613. This section allows the Attorney General to bring an action for injunctive or other relief when he has reasonable cause to believe that a person or persons are "engaged in a pattern or practice of resistance to rights granted by the Act." No similar language is contained in section 3612, which provides for enforcement by private persons of rights secured by section 3604 and other sections.

However, earlier in plaintiffs' trial brief, and similarly during the trial, they alternatively argued that "the substance of the complaint" is "the concept of the 'continuing violation'" as set out in *Havens Realty Corp. v. Coleman,* 455 U.S. 363 (1982). *Havens,* decided during the life of this case, was a private action for damages and injunctive relief brought under section 3612 in which acts of racial steering in violation of section 3604 were charged by a black renter and two "tester plaintiffs," for themselves and a designated class, and by the organization Housing Opportunities Made Equal (HOME). As plaintiffs suggest, the Court's decision on the issue of the 180-day limitations period of section 3612(a) affects this court's treatment

of the nature of the claim which the plaintiffs are bringing.[19]

The Court refused to literally read the Act so that alleged violations that occurred prior to 180 days of the filing of the suit were time barred. The Court dismissed so strict a reading by stating that a "wooden application of 812(a), which ignores the continuing nature of the alleged violation, only undermines the broad remedial intent of Congress embodied in the Act." *Id.* at 380. Finding that the statute of limitations was meant to bar only stale claims, the Court concluded that where

> a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice.

Id.

Since the *Havens* holding on the statute of limitations issue is controlling, this court need not rule on whether or not a pattern or practice action as defined in section

---

19. The Court's decision on the issue of organizational standing affects the standing of HCC to join the City as a plaintiff in this action. The Court held:

> If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low-and moderate-income homeseekers, there can be no question that the organization has suffered injury-in-fact. Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interest. [Citations.]

Havens, 455 U.S. at 379. This court's December 31, 1980 overruling of a motion to dismiss HCC because of lack of standing is consistent with the Court's ruling.

3613 cases may be brought by the plaintiffs under section 3612, and if so, whether such a claim has been proved. Applying *Havens*, 455 U.S. at 380, the court treats plaintiffs' claim as one which charges separate acts of racial steering by Hilltop agents which comprise "an unlawful practice that continues into the limitations period." Accordingly, those alleged violations that occurred prior to 180 days of the filing of this suit will not be time barred if plaintiffs can show that the alleged incidents violated the Fair Housing Act and constituted an unlawful practice which continued into the 180-day limitations period.

The court turns to the audits chronologically beginning with the 1976 audits.

B. Claimed Steering Incidents

(1) Spagnolo-Kuzma

Plaintiffs compare the treatment of white checker Edward Kuzma with the treatment of black checker Hattie Spagnolo as a first steering incident. Edward Kuzma and his wife visited an open house on Dorset Road in Lyndhurst on August 15, 1976. As a result of that open house, Mr. Bill Weir of the Hillcrest office of Hilltop showed the Kuzmas four houses in South Euclid, Highland Heights, and Richmond Heights.

Mrs. Spagnolo had been told to go to the open house and learned from an advertisement in the Sunday paper of its location on Dorset Road in Lyndhurst. Instead of attending the same Sunday open house as told, Mrs. Spagnolo called on Monday and made an appointment for Tuesday at 11:00 a.m. That morning she postponed the appointment until 3:00 p.m. At 2:45 p.m. a lady from the office called to say that Mr. Weir was not in the office.

Mrs. Spagnolo said that she immediately called back "in a white tone of voice" and asked if Mr. Weir was there. He was. She hung up and immediately called again and identified herself. She asked him when she could see the house on Dorset. He answered, "I don't think you can see it." However, he told her to call him back at 6:00 p.m. At 6 o'clock she called him back, and he told her that it was not possible because the seller's child was ill. When Mr. Weir offered to show her another house in the same area, she told him that she didn't want to go because it was too late. Mr. Weir testified that he did not show Mrs. Spagnolo any homes because she broke their appointment.

Plaintiffs argue:

> Spagnolo, the black checker, was denied access to the Dorset house in Lyndhurst through cancellation of her afternoon appointment (and the agent's inartful attempt to pass it off as the checkers doing), and the later excuse about a sick child which prevented a showing of the house that evening, without an accompanying offer by the agent to show the house at a later time.

Plaintiffs contrast the showing of four homes to the Kuzmas. When Mrs. Spagnolo was asked if she told Mr. Weir that she was black, she answered, "I have never told anyone I was black."[20] Moreover, her account of the various conversations with persons at the Hillcrest office of Hilltop and with Mr. Weir offers nothing from which the court may infer that Mr. Weir knew that Mrs.

---

20. While Mr. Weir testified that he thought Mrs. Spagnolo was white, this statement's credibility is greatly weakened by his deposition testimony that he did not recall talking to Mrs. Spagnolo.

Spagnolo was black. Not finding that plaintiffs have proved that Mr. Weir knew that Mrs. Spagnolo was black, the court cannot and does not reach the question of whether in dealing with Mrs. Spagnolo, Mr. Weir intended to racially steer her from access to the Dorset Road home in Lyndhurst.

It is concluded that plaintiffs have failed to prove by a preponderance of the evidence that Hilltop Realty engaged in racial steering in the circumstances of the Kuzma-Spagnolo audit of Hilltop in August 1976.

B.(2) Tufts - Pap

Black checker Sheryl Porter Tufts and white checker Patricia Pap audited Hilltop sales agent John Mayfield. The audit began on August 22, 1976 when each checker visited an open house at 1688 Maple Road, Cleveland Heights.

The two checkers gave Mr. Mayfield substantially the same specifications. Mrs. Tufts said she was looking for a home in Cleveland Heights or South Euclid while Ms. Pap and Ken Kowaleski requested the eastern suburbs.[21] At the end of her inspection of the home on Maple Road, Mr. Mayfield gave Ms. Tufts his card and mentioned that "we would be getting back together." When Mr. Mayfield did not call Ms. Tufts by August 31, 1976, nine days later, she called him. He told her that he was going on a Labor Day vacation and would get back to her after that. On September 9, Mr. Mayfield called Ms. Tufts. He told

---

21. Ms. Tufts informed Mr. Mayfield at the open house that she was married and that she was looking for a house in the $20,000-$30,000 price range. Mrs. Pap, accompanied by Ken Kowaleski who posed as her husband, told Mr. Mayfield that they were looking for a home in the eastern suburbs in the price range of $25,000-$30,000.

her that "he had a house that he would like to show [her] that was on 175th and South Miles." She told him "[she] wouldn't be able to see that one." Asked about the racial composition of that area, she answered, "I believe it was predominantly black in that area."

Mr. Mayfield then invited her to an open house at 2159 Taylor Road attended to by him. When she arrived at the open house, he let her wander around on her own. She testified that Mr. Mayfield stated "he did want to get together with my husband and myself." Ms. Tufts admitted that on at least two occasions Mr. Mayfield asked her to come to the office so he could "run [information on her housing requirements] through the computer, and [she] did not do that." Asked why not, she stated: "Well, I didn't have—he wanted to meet my husband, and I didn't have a husband to take with me."

Defendants argue:

> There is simply no viable claim of lack of service to Tufts. Mayfield tried to service her, but she simply was not willing to meet with him.

The evidence bears out this contention. But this argument does not meet plaintiffs' claim of racial steering with reference to Ms. Tufts. Mr. Mayfield on September 9 suggested a home to Ms. Tufts at 175th and Miles, "predominantly black in that area" and also an area in which she had expressed no interest to Mr. Mayfield. The other home he suggested was the home at 2159 Taylor Road, which she stated in her checker's report was "on the edge of Cleveland Heights." The court judicially notes that 2159 Taylor Road (North Taylor Road) is adjacent to East Cleveland, whose population in 1977 was 77 percent black. It is inferred that the home at 2159 Taylor Road was in

a neighborhood more integrated than the Cleveland Heights city-wide average level of integration.[22]

In conjunction with Mr. Mayfield's suggestion of the South Miles Road house and the Taylor Road house to Ms. Tufts, statements made by Mr. Mayfield to Ms. Tufts at the Maple Road open house bear on his intent and frame of mind. Ms. Tufts testified that in her discussion with Mayfield,

> he started telling [her] that there had been a white lady that had looked at the house, and she decided not to take the house because there were too many black people in the area.

She also stated that he "started pointing out some of the houses where the white people lived and where black people lived." During defendants' examination of Mr. Mayfield, he denied discussing the "racial make up of [the] neighborhood around [the] Maple Road home" with any prospect at anyone of his open houses. This broad denial of the specific quotation attributed to him by Ms. Tufts is not credited. Ms. Tufts' report of Mr. Mayfield's statements at the open house is credited.

These statements of Mr. Mayfield, considered together with the showings, are deemed to have been made by Mr. Mayfield to influence the housing choices of Ms. Tufts. Therefore, it is concluded that in violation of section 3604(a), Mr. Mayfield racially steered Ms. Tufts toward both a predominantly black area outside of Cleveland

---

22. "More integrated" is used to mean a percentage of blacks higher than the City's 1980 census black population of 24.9 percent. The census tract map shows that North Taylor Road is on the border between census tracts 1402 and 1403, which had black populations of 34.8 percent and 53.7 percent, respectively.

Heights and to a more integrated area within Cleveland Heights.

Mr. Mayfield also made racial statements to Ms. Tufts' white counterparts, Patricia Pap and Ken Kowaleski, on August 22, 1976 at the Maple Road open house and later at his office. At the open house he told a story about his brother-in-law buying from a black family a house which he needed to fumigate before moving into it. At the office, while going over house listings, Mr. Mayfield said that they were lucky to be white because they could get a better deal. When asked why, "he said it was just human nature, that owners prefer selling to whites." He added that "they sold to whites 80 percent of the time, and that was the way it should be."

On August 25, 1976, Mr. Mayfield showed homes to Ms. Pap and Mr. Kowaleski on 3730 Monticello Boulevard, 1005 Englewood Road, and 2054 Revere Road in Cleveland Heights. As Mr. Mayfield stated to Ms. Pap after they left the house on Englewood, "The neighborhood wasn't very integrated." Ms. Pap testified that Mr. Mayfield noted:

> There was a high demand for white buyers and that all of the agents knew this and showed them the neighborhood first.

Further, on leaving the Revere Road property, Mr. Mayfield stated that:

> [H]e preferred the Englewood area. He said that it wasn't as integrated as the area around Revere and never would be.[23]

---

23. When asked if he ever told "a white prospect that the Englewood area was not as integrated as the Revere area and never would be," Mr. Mayfield answered (on direct examina-

(Continued on following page)

Mr. Mayfield's comments to Ms. Pap and Mr. Kowaleski relating to Revere and Englewood are weighed in connection with their request to see properties in the eastern suburbs. In other words, they did not specifically ask to see properties in Cleveland Heights, although they did fix a price range of $25,000-$30,000. Ms. Pap's testimony further shows that Mr. Mayfield passed over three homes in their stated price range: 18005 Chagrin Boulevard in the Lomond school district and 3733 Menlo Road in the Moreland school district in Shaker Heights; and 927 Caledonia, Cleveland Heights, in the Caledonia school district. These properties were listed on the computer print-outs obtained by Mr. Mayfield for Ms. Pap and Mr. Kowaleski at his office Sunday afternoon, August 22, 1976. With reference to these three properties, Mr. Mayfield stated that "[you] wouldn't be interested in them." Asked why, Ms. Pap said he answered, "Those neighborhoods weren't integrated anymore, that they were black, and that even blacks were reluctant to buy in the neighborhood."[24]

Footnote continued—

tion), "No. I wouldn't make that type of comment." On cross-examination he modified his position. When asked, "and you didn't say anything to her about Englewood not being as integrated as Revere; is that correct?", he answered, "I don't even remember talking to the person." He was further asked, "You don't remember talking to a young, attractive white female at this open house on Maple?" He answered, "No." Ms. Pap recorded her conversation with Mayfield on the same day on which he showed her and Kowaleski the homes on Monticello Boulevard, Englwood Road, and Revere Road. Her testimony is credited. Mr. Mayfield's denial is not credited.

24. With reference to these three homes, Mr. Mayfield was asked if he remembered saying to "Mrs. Pap and the gentleman she was with that all three of these homes were in areas that were integrated and that she wouldn't want to buy there." He answered, "No, because I wouldn't make that kind of comments about any areas." Ms. Pap refreshed her memory directly from her auditor's report made contemporaneously with the audit. Once again her testimony on this matter is credited and Mayfield's testimony is discredited.

Mr. Mayfield's statements, which diverted Ms. Pap and Mr. Kowaleski from consideration of those three properties located inside and outside of Cleveland Heights in "neighborhoods [that] weren't integrated anymore" and his comments relating to Revere and Englewood together constitute actions on his part which "ma[d]e unavailable or den[ied] a dwelling to [a] person because of race" in violation of section 3604(a). It is so concluded. The statements of Mr. Mayfield, made on August 22, 1976 to Ms. Pap at the Maple Road open house and to her and Mr. Kowaleski in his office, corroborate Mr. Mayfield's locational steering with reference to checkers Pap and Kowaleski.

B.(3) McGee—Butterfield

The next audit claimed to involve racial steering was of John Mayfield. This audit, conducted by black checker Sandra McGee and white checker Hester Butterfield, began with an open house in May 1977 at 3395 DeSota Avenue, Cleveland Heights.

Mrs. McGee visited the open house on DeSota about 3:30 in the afternoon. As she viewed the house, Mrs. McGee informed Mr. Mayfield that she presently owned a home on Berkeley, the street next to DeSota, and that she was "looking for a brick or an exceptional frame . . . in the Hillcrest/Heights area." She gave Mr. Mayfield a price range in the "upper $30's and lower $40's." He asked where she was interested, and she told him, "South Euclid, Lyndhurst and Cleveland Heights." He told her that "Lyndhurst would be a little bit on the high side for [her] price." As for South Euclid, he said "that's on the Lyndhurst side." He said that something could be done in Cleveland Heights.

Three days later she called Mr. Mayfield and arranged for him to give her a computer print-out at her home. He brought over a print-out of South Euclid and went over it with her. When she asked where the print-out for Cleveland Heights was, he said he would bring it to her the next day, but did not.

On May 18 she called him and said she was interested in five or six homes on the South Euclid print-out which he had left with her. He told her that the homes were "sold or sales pending." Arrangements to go out and see homes were then discussed. He suggested they meet on Friday at 11:00 a.m., but she told him "that wasn't a good day." She then suggested Saturday, and he responded that he "would call her on Thursday and we could arrange something." However, at no time did he later get in touch with her.

At trial, Mr. Mayfield remembered the open house on DeSota but had no recollection of Sandra McGee. In view of his nonrecollection of Sandra McGee, no evidentiary basis is perceived for defendants' argument that

> there is a substantial likelihood that he would have viewed her simply as a "shopper" since she came from church on a Sunday and lived on the adjacent street.[25]

Although Mrs. McGee no longer has the South Euclid computer print-out, it is determined that Mr. Mayfield delivered it to her as she testified. It is not probable that on May 11 the homes on the South Euclid print-out were apparently available, and on May 18 all five

---

25. Actually, the record does not show that she had not come directly from church, nor does it show that Mr. Mayfield was informed that she had been at church earlier that afternoon.

or six properties she inquired about were "sold or sales pending," as Mr. Mayfield told Mrs. McGee. However, in the absence of the print-out it is impossible to determine the accuracy of his report.

Nonetheless, it is found from the evidence that Mr. Mayfield's failure to provide a further South Euclid print-out, his failure to deliver a Cleveland Heights print-out as promised, and his failure to call her back after Thursday, May 18, as promised, or at any other time to arrange a time to show homes to Sandra McGee, combine to "make unavailable or deny a dwelling to" her "because of race." It was, therefore, a violation of section 3604(a).

When Mr. Mayfield's treatment of Sandra McGee is compared with his treatment of white checkers Don McKelvey and his wife Hester Butterfield, Mr. Mayfield's lack of service to Sandra McGee is even more pronounced. Even though Mr. McKelvey did not go to the open house, he was able to arrange a viewing of the same house, and later he and his wife met with Mr. Mayfield at the Hilltop office. There, some ten homes were jointly selected by Mr. Mayfield, Mr. McKelvey and Hester Butterfield. Mr. Mayfield showed them three of those homes, all located in Cleveland Heights.[26]

---

26. Plaintiffs' counsel refers to a remark of Mr. Mayfield reported by the white checker that "that end of Scottsdale [in Shaker Heights] is over-integrated and I know you folks don't mind living in an integrated section, but that end is over-integrated." Plaintiffs' counsel then contend:

> That remark coupled with the failure to show the house, constituted both direct and indirect discouragement of the white checker's seeing that particular house.

While the statement was an attempt to steer Ms. Butterfield and her husband away from a Shaker Heights home, it did not steer them away from Cleveland Heights.

B. (4) Embry-Caron

Black checker Dorothy Embry and white checker Brian Caron each visited the November 13, 1977 open house at 2086 North Taylor, Cleveland Heights, close to the Cleveland Heights—East Cleveland border. The Hilltop agent "sitting" at the open house was William Howard.

Dorothy Embry stated that she arrived at the open house at "4:14." When Mr. Howard asked her what type of house she was looking for, she answered: "a four-bedroom house in the mid $50's to lower $60's." As to location she recalled saying eastern suburbs. She did not recall whether she said Cleveland Heights and eastern suburbs or "merely eastern suburbs." At trial she did not recall at first asking Mr. Howard for the school district, but did recall this when her memory was refreshed from her deposition. The school district is the Caledonia school district of East Cleveland. After Mr. Howard took her around the house, she left.

Two days later, Mr. Howard called to ask her if she was "really interested in purchasing the house on Taylor, because he had another offer, and that he had lined up some other homes for us to see." An appointment was set up for the next Friday at the Hilltop office on Mayfield Road. Mr. and Mrs. Embry and their two sons went to the office where they met Mr. Howard. After answering several of Mr. Howard's financial qualifying questions, they left to see the homes which he had selected.

The first house was on Henley in East Cleveland, the second at 1231 Hereford in Cleveland Heights, and the third was at 2086 North Taylor Road in Cleveland Heights where the open house had been held. After visiting the house at 2086 North Taylor Road, they returned to the

Hilltop office. In her comments on her audit report she stated:

> As we returned to the office Mr. Howard said he would line up other houses in some other eastern suburbs. He did not give any specifics.

When Mr. Howard called Mrs. Embry, she told him that she was no longer interested in seeing any other homes. The homes he showed to Mr. and Mrs. Embry were all in the predominantly black Caledonia school district, either in predominantly black East Cleveland or in an adjacent more integrated area of Cleveland Heights. However, any inference of racial steering of Mr. and Mrs. Embry by agent Howard is neutralized by Mrs. Embry's admission that Mr. Howard offered to show them homes in the eastern suburbs, but they rejected this offer.

White checker Brian Caron also spoke to agent Howard at the Taylor Road open house. He had a conversation with Mr. Howard in which the housing characteristics that he gave were generally the same as those Mrs. Embry gave to Mr. Howard. Before leaving the Taylor Road open house, he told Mr. Howard:

> It's probably not exactly what we were looking for, we generally would like to see more houses on the east side, we do like the feature of the land, but we would like to look at more houses, would you please contact us relative to showing us more houses and seeing if we can find something that we like.

When Mr. Caron did not hear from Mr. Howard, he called him on November 16. Mr. Howard returned his call on the 18th and explained that he would "not be able to show [him] houses as he had prior engagements out of town or was planning to be out of town." He then explained that

> there was a realtor available that could show me houses I would be interested in, a Mr. Mayfield, it was a type of a three-way conversation where I was introduced to Mr. Mayfield and told that he would be happy to show me anything I would be interested in.

After several unsuccessful attempts to arrange a mutually convenient appointment time, Mr. Mayfield rescheduled the appointment for December 3. Mr. Caron said that he met Mr. Mayfield at the Hilltop office. Mr. Mayfield then drove him to a home at 374 Belvoir in South Euclid. It was Mr. Caron's understanding that "there was a specific house that [Mr. Mayfield] wished to show [him] and that he thought met [his] needs." Although Mr. Mayfield did not recall Brian Caron by name, he did recall showing Bill Howard's prospect a ranch on Belvoir. Mr. Mayfield also remembered that after Mr. Howard came back to town he "gave [Mr. Howard] the prospect back."

Mr. Caron has lost all recollection as to whether it was Mr. Howard who picked out the house on Belvoir. However, his audit report, shown to him at trial, indicated that "Howard talked about a house in Forest Hills as well as the house in South Euclid," and Mr. Caron said that sounded correct.

Upon returning to the Hilltop office, Mr. Mayfield prepared a computer print-out of additional homes as suggestions to Mr. Caron. The homes on this list were in Cleveland Heights, University Heights and one in Shaker Heights. Most, however, were in Cleveland Heights. Mr. Mayfield gave him a computer print-out, but later Mr. Caron called Mr. Mayfield to say that he had no interest in purchasing a home.

Upon all the relevant evidence, it is concluded that it was Mr. Howard and not Mr. Mayfield who recommended the Belvoir home to Mr. Caron, the white checker. Thus, Mr. Howard was responsible for the showing of a home outside of Cleveland Heights in a predominantly white eastern suburb to Mr. Caron. Nevertheless, any inference that Hilltop, through the combined conduct of Mr. Howard and Mr. Mayfield, steered Mr. Caron into a suburb east of Cleveland Heights is rebutted by Mr. Mayfield's submission of a list of homes to Mr. Caron on December 3, the majority of which were in Cleveland Heights. Hence, it is concluded that the plaintiffs have not established racial steering on the part of either Mr. Howard or Mr. Mayfield with reference to either black checker Dorothy Embry or white checker Brian Caron.

B.(5) Perry-Blaser (April 4, 1978)

Black checker Anita Perry and white checker Linda Blaser conducted an audit of the Hilltop office in Cleveland Heights on April 4, 1978. This audit was part of the 1978 spring audits using the HUD procedures. Anita Perry was interviewed by Phyllis Williams, while Linda Blaser dealt with John Mayfield.

Anita Perry relied on her audit report to refresh her recollection of her meetings and telephone conversations with Mrs. Phyllis Williams, who greeted her when she entered the Hilltop office. She told Mrs. Williams that she was interested in property in the eastern suburbs priced from $55,000 to $60,000. She also stated that she lived in and liked Cleveland Heights. While she had lived in Cleveland Heights on Coleridge, she and her family for five years prior to 1978 had been living in a home on Washington Boulevard in University Heights.

From a multiple listing book, Mrs. Williams suggested certain homes and "urged [her] to pick others." Of the four or five homes that were suggested, Mrs. Williams showed her homes at 2895 Meadowbrook in Cleveland Heights and 3586 Meadowbrook in University Heights, several homes from the Cleveland Heights—University Heights line.[27] Both homes met Mrs. Perry's space requirements, each having more than four bedrooms.

When Mrs. Perry's deposition testimony was called to her attention, she agreed that Mrs. Williams called her back several times to try to show her additional homes. Mrs. Perry made a list of the homes suggested to her: 3536 Woodridge, 652 Quilliams, and 1496 Middleton, all in Cleveland Heights. However, this list was attached to her audit report, and Mrs. Perry agreed that these homes were suggested to her "during the actual audit . . . rather than a phone call that occurred days later."

While Mrs. Perry had requested homes in the eastern suburbs, she singled out Cleveland Heights. Since she said that she liked Cleveland Heights, it was understandable that Mrs. Williams showed her homes in Cleveland Heights and one just over the boundary line of University Heights. Bearing in mind also that Mrs. Williams called her back several times after the audit to show her additional homes, offers which Mrs. Perry declined, it is concluded upon all the evidence that no inference of intentional racial steering may be drawn.

On April 4, 1978, Linda Blaser met with John Mayfield at the Heights Hilltop office. She asked to see homes in the Heights-Hillcrest area. Mr. Mayfield obtained a

---

27. The zip code shows that the last home in Cleveland Heights is 3556 Meadowbrook, and the first home in University Heights is 3577 Meadowbrook.

computer print-out and suggested six or more homes from it. At Mrs. Blaser's insistence, Mr. Mayfield "picked" three homes from the six or more, but no others. Of those three, Mr. Mayfield was able to show the inside of a home at 1440 Gordon in Lyndhurst and a home at 4931 Westbourne, Lyndhurst. He drove her by to see the exterior of a home at 1607 Oakmount in South Euclid.

Refreshing her recollection from her audit report, Mrs. Blaser indicated that Mr. Mayfield talked down both of the Lyndhurst homes and also told her that homes in Mayfield Heights were too expensive. Mrs. Blaser agreed, and her audit narrative corroborates, that "Mr. Mayfield encouraged her to look in Cleveland Heights but actually showed some houses in Lyndhurst." Since he showed her no homes in Cleveland Heights, the encouragement to look in Cleveland Heights was only talk. Mrs. Blaser further recorded in her audit report the following statement by Mr. Mayfield:

> You probably won't want your kids to go to East Cleveland schools. They are mostly black but some white home buyers are buying there for the lower prices.

While she did not remember the context in which this statement was uttered, it is nonetheless concluded that she accurately recorded the statement made by Mr. Mayfield. Since a portion of Cleveland Heights is in the Caledonia School District of East Cleveland's school system, the remark, stressing the "mostly black" character of East Cleveland's schools, would tend to disparage living in the portion of the City which comprises the Caledonia school district.

As a sales agent in the Heights-Hilltop office, Mr. Mayfield's making of this remark and his showing of houses only outside of Cleveland Heights, even though she had

asked for the Heights-Hillcrest area, which includes Cleveland Heights, persuades this court that Mr. Mayfield racially steered Mrs. Blaser away from Cleveland Heights in violation of section 3604(a).

B.(6) Perry-Blaser (April 10, 1978)

Anita Perry and Linda Blaser on April 10, 1978 audited Hilltop's Hillcrest office in Lyndhurst, Ohio. Anita Perry dealt with William Weir, and Linda Blaser dealt with Violet (Vi) Costello.

Anita Perry arrived at the Hillcrest office at 3:10 p.m. and departed at 4:50 p.m. She testified as to what occurred during this period only by refreshing her recollection from her audit report. Using the site visitation assignment sheet, Mrs. Perry testified that she had indicated to agent Weir that her price range was $55,000 to $60,000. While Mr. Weir testified that he did not recall her telling him that, her statement is credited.[28] Mrs. Perry also testified that she had told Mr. Weir that she was "looking for a home in the eastern suburbs."

No homes were shown to Mrs. Perry on Monday afternoon, April 10. Two homes in Cleveland Heights, at 2383 Lee Road and 3283 Meadowbrook Boulevard, were shown to Mrs. Perry on the morning of Wednesday, April 12. A critical question is how these two homes were chosen for viewing.

Mrs. Perry's testimony indicates that Mr. Weir suggested the homes shown to her, even though Mr. Weir at one point showed her a multiple listing book "and urged [her] to pick [homes] out." Mr. Weir testified that in go-

28. He said that either he or Mrs. Perry determined that her price range was up to $50,000. Even if true, the exact price range stated to Mr. Weir is not material.

ing over the multiple listing book, Mrs. Perry selected "a couple of properties." But on cross-examination he stated that "we both picked them out." Given the forceful personality Mr. Weir exhibited throughout his testimony and other testimony which challenged his credibility,[29] it is determined that as Mrs. Perry testified, Mr. Weir "suggested both the two [houses] he showed me." These houses were on Meadowbrook Boulevard and Lee Road in Cleveland Heights.

On the basis of the relevant evidence in the record, it is inferred and concluded that by selecting two Cleveland Heights homes, each in a more integrated area,[30] and by failing to suggest a home which met Mrs. Perry's specifications in an eastern suburb other than Cleveland Heights,

---

29. Mrs. Perry's audit report bears on Mr. Weir's credibility. Made immediately after the house visitations on April 12, it contains a note that explains why it was a few days before the two got together on an appointment:

> Agent said he didn't have time. Agent said he would call me on Tuesday and would arrange a time to see some houses by Wednesday. He hadn't called, and I called him.
>
> And he said, "Oh, I thought we were supposed to meet at 9:30 this morning?" And I told him no.
>
> He wanted to know why didn't I call him earlier and why didn't [I] keep the appointment that I had.

Mr. Weir's attempt to charge Mrs. Perry with breaking an appointment is similar to his statement to Mrs. Spagnola after she had made several phone calls trying to reach him.

Mr. Weir's credibility is further challenged by other testimony. He stated that "there was a problem with her car, and I said, well, I'd pick her up." Asked where he picked her up, he answered, "I picked her up at her house on Coleridge." Mrs. Perry testified that she had a car available for her use at that time and did not remember why Mr. Weir picked her up. Moreover, her home where he picked her up was not on Coleridge (where she had not lived for five years) but on Washington Boulevard in University Heights.

30. Both the Lee Road and the Meadowbrook Boulevard properties are in Census Track 1416. According to the 1980 census, that tract had a black population of 30.9 percent.

although homes were then available, as later found, Mr. Weir engaged in racial steering by making unavailable or denying a dwelling to Mrs. Perry because of race.

The question arises whether there is other evidence to rebut the finding of locational steering by Mr. Weir. Because Mrs. Perry was not sure whether she told Mr. Weir she would let him know whether she liked either home she saw after she talked to her husband, she never called Mr. Weir back. Mr. Weir, on the other hand, testified that he told Mrs. Perry he would call for another appointment, called at least three times, and was always given "an excuse not to go out again." He said he told her that he had a home available "in the Birchwald-Mackall area of South Euclid."

On cross-examination Mr. Weir was asked if he remembered that Mrs. Perry asked to see the eastern suburbs. He answered, "I tried to show her the eastern suburbs." Asked if he considered showing her a home on either Clearview or Westbourne (both homes in Lyndhurst), he answered, "Not that I can recall." As part of the April 10, 1978 audit of the Hillcrest office of Hilltop, Linda Blaser, the white counterpart of Anita Perry, was shown the Westbourne home in Lyndhurst, a four-bedroom house priced at $59,900. This was also within Mrs. Perry's price range.

Thus, there is evidence that the Westbourne four-bedroom property in Lyndhurst was available but not shown to Mrs. Perry on or about April 12, 1978, the time Mr. Weir stated that he was trying to show Mrs. Perry homes in the eastern suburbs. Further, there is no evidence on the record indicating that a home on Birchwald was available and within the specifications of Mrs. Perry. Neither Mr. Weir's claimed offer to show

her a home on Birchwald nor a general offer to show her homes in the eastern suburbs is credited. The inference of racial steering on the part of Mr. Weir is not rebutted.

The court turns now to the other half of the audit of the Hilltop Hillcrest office, which was performed on April 10, 1978. Linda Blaser walked into the office at 11:00 o'clock and spoke with agent Vi Costello about looking at houses, according to her audit report. Agent Costello testified that Mrs. Blaser could not have come in at 11:00 because she had "floor duty that afternoon." Resolving the conflict, it is concluded that the audit began at 11:00 a.m. on the morning of April 10, as recorded contemporaneously on Mrs. Blaser's audit report.[31]

Mrs. Blaser's testimony of her various conversations with Mrs. Costello was not remembered independently of her written audit report but was given after her recollection was refreshed from it. Upon the agent's request, she gave her telephone number and address on Rolliston Road in Shaker Heights, Ohio. Mrs. Blaser testified that she told the agent that she was seeking housing in the Heights-Hillcrest area. Mrs. Costello recalled that Mrs. Blaser said "she liked the Hillcrest area."

Mrs. Blaser said that the agent showed her a multiple listing book and "suggested some houses and urged [her] to pick others." Mrs. Costello said six houses were picked out from the multiple-listing book, and then computer print-outs were obtained on them. One of the six was a house which Mrs. Costello picked out on Quilliams in Cleveland Heights. Mrs. Costello said the six homes were

---

31. Mrs. Blaser's recorded 11:00 a.m. as the time of entering the Hilltop office is credited rather than Mrs. Costello's uncorroborated recall of "that afternoon" as the time of Mrs. Blaser's arrival at the Hilltop office.

all Hilltop listings, which she had already seen on Hilltop's weekly tour. When Mrs. Blaser told her that she only had time to see three homes, Mrs. Costello stated that "[I] picked the ones that I thought were the nicest and that she would like." She selected a three-bedroom home on Clearview in Lyndhurst, a four-bedroom home on Westbourne in Lyndhurst, and the four-bedroom home on Quilliams Road in Cleveland Heights. The remaining three were on Avondale in South Euclid, on Gordon in Lyndhurst, and on Ranchland in Mayfield Heights.

Mrs. Costello indicated that she did not group Cleveland Heights in the Hillcrest area. Bearing that in mind and that Mrs. Costello included a home on Quilliams Road in Cleveland Heights among the three homes to show Mrs. Blaser, it is concluded that Mrs. Blaser did designate the Heights-Hillcrest area as the area in which she was seeking housing. Inasmuch as the three homes picked out by Mrs. Costello fell within the Heights-Hillcrest area, the selection of these homes, standing alone, did not constitute racial steering.

However, these showings must be considered in conjunction with certain statements made by Mrs. Costello in the course of the showings. At a point in her audit report, Mrs. Blaser wrote:

> Agent said a lovely black woman was looking at this house a couple of days ago. I thought she might buy it but I haven't heard from her.[32]

---

32. Asked whether that note referred to the Westbourne property, Mrs. Blaser stated, "I don't know which one it refers to. Stating without support that the statement was made "during the visit to the Westbourne house in Lyndhurst," plaintiff argues that this "unsolicited comment . . . unnecessarily injected race into the situation." Countering, defendants note that the

(Continued on following page)

Mrs. Blaser noted in her audit report two other conversations with Mrs Costello concerning race. While the Quilliams Road property was being discussed in the office, Mrs. Blaser recorded that Mrs. Costello asked her "if the school my kids go to is integrated and how much," to which she answered, "Yes." Mrs. Costello then stated, "Just about every place is integrated now. I think they ought to be able to live wherever they want." Mrs. Costello denies making these statements. The court finds no basis for discrediting the accuracy of the statement attributed to Mrs. Costello which Mrs. Blaser recorded in her audit report.

With her recollection refreshed, Mrs. Blaser said that at the Quilliams Road property, the "agent said, your kids would go to Cleveland Heights High. Do you want your kids to go there?" Mrs. Blaser believes that she "would have said something vague in response." Denying such a statement, Mrs. Costello said that in the car going back from Quilliams to the office, Mrs. Blaser "said that she lived in Cleveland Heights; if she stayed there her children would be going to Cleveland Heights High." In response, Mrs. Costello stated, "Do you want them to—don't you want them to go to Cleveland Heights?" She does not remember what Mrs. Blaser said after that.

Footnote continued—

checker "did not view this comment as derogatory" and urged that from it "no intent to steer" can be inferred. Given this country's wide diversity of ethnic and racial stocks and the dividends diversity brings to all of us, a non-discriminatory reference to race was not derogatory, and it would be unrealistic to try to proscribe any such comment. To say that she thought the lovely black lady "might buy it," exhibits a willingness to sell a home in Lyndhurst to blacks. No intent to steer is inferable. If Mrs. Costello, with reference to either the Clearview or Westbourne property in Lyndhurst, stated that a "lovely white lady was looking at this house a few days ago," there would be a more reasonable basis from which to infer intent to racially steer.

Mrs. Costello's recollection of this car conversation with Mrs. Blaser falters since Mrs. Blaser had told her she lived in Shaker Heights, not that "she lived in Cleveland Heights." On the other hand, having been told by Mrs. Blaser that she lived in Shaker Heights, it was consistent that Mrs. Costello, in showing the Quilliams Road property, would say to Mrs. Blazer, "your kids would go to Cleveland Heights High," as Mrs. Blazer reported. It is found that the statement of Mrs. Costello as recorded by Mrs. Blaser in her audit report is the accurate version of the conversation.

It is concluded that the agent's statement at the Quilliams Road property with her other statements made at her office are not sufficient to influence housing choices and do not prove intent to steer.

B. (7) Drake-Bartoo

Black checker Adrienne Drake and white checker Ruth Bartoo audited the Heights office of Hilltop Realty on April 14, 1978. Ruth Bartoo met agent Norman Hott, and Mrs. Drake met agent Ann Gilmore.

According to her completed audit report, Mrs. Drake arrived at the Heights office at about 2:15 p.m. Mrs. Drake had specified on her report that she requested a three-bedroom house in the "50's." Mrs. Drake testified that in response to the question on her audit report about whether the agent requested information on "location by neighborhood or jurisdiction," she had circled "yes." In her trial testimony, Mrs Drake was asked further about this request. She answered:

> If she requested and if it says that, I told her what was on the front page.

Q. And what was that?

A. Lyndhurst, Cleveland Heights, Shaker Heights, South Euclid.

On cross-examination Mrs. Gilmore was asked, "Do you remember her saying to you that she would like to look in Lyndhurst, Cleveland Heights, Shaker Heights and South Euclid area?" She answered, "No, she never said that." Asked if she was sure, she responded:

> I'm positive. She didn't seem to know any of these areas. I thought maybe she was from out of town or new, and I suggested that we tour—each time we'd go out we'd tour a new area.

Since Mrs. Drake's assignment was to say that she was seeking homes generally in the eastern suburbs and "if the agent pins you down, then you narrow it," it is concluded that Mrs. Drake did mention the eastern suburbs and then specified Lyndhurst, Cleveland Heights, Shaker Heights and South Euclid.

The testimonies of Mrs. Drake and Mrs. Gilmore indicate that Mrs. Gilmore "volunteered to [Mrs. Drake] as serious possibilities three houses." These were at 3536 Woodridge, 2383 Lee Road and 3583 Blanche, all in Cleveland Heights. They inspected the Woodridge home on the inside. As for the home at 2383 Lee Road, Mrs. Drake told Mrs. Gilmore "to keep moving" when they drove by.

Mrs. Drake stated that on that first day (April 14) she and Mrs. Gilmore just looked in the window of the Blanche Road property "because she didn't have a key." But she said that they met the next day at which time they inspected the insides of both the Blanche Road prop-

erty and property on Shannon Road. Having a different recollection of the matter, Mrs. Gilmore said that she "showed her two houses on one day, then we went past a third house [Blanche] that was already sold." The question was then asked, "so you were never inside the house on Blanche with Adrienne Drake?" She answered, "We were standing outside on the curb. I thought it was strange that she wanted to go in that house." It seems likely that Mrs. Gilmore is describing their visit to the Blanche Road property the night before when they could not enter the house because she didn't have a key. As Mrs. Gilmore stated, records could have been checked by Hilltop to confirm or contradict her statement that the "house was sold." However, in the absence of support for Mrs. Gilmore's statement, and since Mrs. Drake answered several questions in her audit report which showed that she had been shown the inside of the Blanche Road property, her statement that she viewed the inside of the property on the next day (April 15) is credited.

Through Hilltop, Mrs. Drake was shown four homes during the audit period, all in Cleveland Heights. Subsequent to returning her audit materials to HCC, she was contacted again by Mrs. Gilmore. Mrs. Drake was then shown a house in Cleveland Heights off Mayfield Road, "a couple of streets over from the real estate office." Given that Mrs. Drake requested to be shown the "Eastern suburbs" and in particular Lyndhurst, Cleveland Heights, Shaker Heights and South Euclid, yet was shown five homes in Cleveland Heights, it may be reasonably inferred that Mrs. Gilmore racially steered Mrs. Drake into viewing homes only in Cleveland Heights. This inference is further supported by the fact that Mrs. Drake's white counterpart Ruth Bartoo gave generally the same qualifica-

tions but was shown homes all outside of Cleveland Heights.

The question arises whether other relevant evidence rebuts this inference of racial steering. Mrs. Drake was asked if after she was shown the home off Mayfield, Mrs. Gilmore called her and "again suggested that she wanted to show [her] some other homes." She answered: "I can't say yes, and I can't say no. Probably." On redirect examination, Mrs. Gilmore was specifically asked the question "why didn't you show Mrs. Drake any homes outside of Cleveland Heights?" She answered:

> Mrs. Adrienne Drake did not know where she wanted to live. My main purpose at that point was to find out what kind of home she was looking for. Then I was encouraging her to bring her husband so that her husband then would be able to give me more data. Between one house and another it could be $300, $400 a month on your monthly payment. It's important to find out exact price range. So I had mentioned it to her, the same as I did in the deposition, why don't we just tour each suburb and area and then look over the area and decide what you want. . . .

Mrs. Gilmore's recollection of the details of her contacts with Mrs. Drake was shown to be faulty on a number of different details. Nonetheless, her suggestion to Mrs. Drake that "we just tour each suburb and area and then look over the area and decide what you want" stands unchallenged in the record.

Mrs. Drake's acknowledgment that it was "probably" true that Mrs. Gilmore called to again suggest that Mrs. Drake see "some other homes," combined with Mrs. Gil-

more's unchallenged testimony that she suggested to Mrs. Drake that they "tour each suburb and area" to determine Mrs. Drake's housing preferences, act to rebut any inference that Mrs. Drake was racially steered from seeing homes outside of Cleveland Heights.

Ruth Bartoo, the white counterpart of Adrienne Drake, audited the Heights office of Hilltop Realty on April 14, 1978. Her characteristics and specifications given in the site assignment form were similar to those of Mrs. Drake. Listed under the heading "Neighborhood" was "Shaker, Cl. Hts, Lyndhurst, May," and the price range was "50-60."

With her recollection refreshed by her audit report, Mrs. Bartoo testified that she arrived at the Heights office of Hilltop at about 10:00 o'clock without first calling for an appointment. Although Mr. Hott testified that Mrs. Bartoo called the office that morning before she came that afternoon, the court credits Mrs. Bartoo's recollection.[33]

Mrs. Bartoo testified that she told Mr. Hott that she "was interested in the Heights area, Mayfield, Lyndhurst." She further said that she knew that she wrote "those three down on a sheet and apparently did not say South Euclid." Asked if she recalled for sure from her own independent recollection, she answered, "Only from what I reviewed on my forms." At trial Mr. Hott testified:

---

33. Mr. Hott's trial testimony conflicts with his deposition testimony. At the deposition he was asked, "is there anything that particularly made her stand out in your mind?" He answered:

> That she came into the office, she was in a terrible hurry and she gave me some information but she wanted to leave quickly. I took some information, she was coming back later because she wanted to go look at some houses.

> I recall she called in, said that she was looking for a home in the eastern suburbs in the approximately $50,000 range, that her husband was a professor at the University, and that she lived in Cleveland Heights in the Coleridge area.

Given Mr. Hott's confusion as to whether Mrs. Bartoo first called or came into the office, Mr. Hott may also have been confused when he said that she requested the eastern suburbs. While Mrs. Bartoo may first have mentioned the eastern suburbs, it is found that she became more particular and named the Heights area (Shaker and Cleveland Heights), Lyndhurst and Mayfield Heights, the communities listed on her site visit assignment sheet.

Mrs. Bartoo testified that during the time she was at the office that morning, Mr. Hott suggested that they see homes on Westbourne in Lyndhurst, on Avondale in South Euclid, and on Edison in Cleveland Heights. That afternoon, Mr. Hott and she visited two homes in Lyndhurst, the suggested one on Westbourne Road and another on Gordon Road, and the Avondale home in South Euclid.

On cross-examination, Mrs. Bartoo acknowledged that in addition to the three homes suggested in the morning, (Westbourne, Lyndhurst; Avondale, South Euclid; and Edison, Cleveland Heights), there were two other houses suggested as serious possibilities. Counsel asked her "where was the fourth or fifth house that was suggested to you as a serious possibility?" She answered, "I only wrote down the first three. I didn't record others suggested to me in the office." Moreover, she had no independent recollection of "where those other homes were" and said she had no idea what community they were located in." However, when asked "was the Gordon home one of the four or five homes suggested to you in your first

meeting," she answered "it may have been." Concerning the Edison Road house in Cleveland Heights, she was asked, "Did Mr. Hott tell you why he did not show you the Edison Road house in Cleveland Heights?" She answered, "I don't remember if he told me or not." Nor did she remember asking him about it.

Mr. Hott was asked on direct examination, "where were the homes that you had selected?" Mr. Hott answered, "Lyndhurst, South Euclid and Cleveland Heights." He testified that they started in the Lyndhurst area with the Westbourne house and then saw the Ardmore house in South Euclid. At this point he said, "We ran out of time and she said that was all the time she had, she had to go some place else and we went back to the office." When Mr. Hott was asked why he did not first show the home in Cleveland Heights, he answered, "Just a matter of going out to Lyndhurst and coming back in, that's all."

It is found that Mr. Hott had planned to show Mrs. Bartoo a home in Cleveland Heights but that they did not see it because Mrs. Bartoo said that she had run out of time. Although there is evidence from Mrs. Drake's audit that there were other homes in Cleveland Heights of comparable requirements, Mrs. Bartoo has no recollection of the location of two other homes that Mr. Hott suggested.[34] Since Mr. Hott had planned to show her a Cleveland Heights home, since Mrs. Bartoo said that she had run out of time, and since Mr. Hott at no time made any mention of race, the totality of the evidence does not permit a finding that any preference which Mr. Hott

---

34. Asked if he received listings on Shannon Road, Lee Road, Blanche Road and Woodridge Road when he printed out homes in the Cleveland Heights area, to each question Mr. Hott answered "I don't recall."

disclosed in showing homes outside of Cleveland Heights and in not showing homes within Cleveland Heights was because of race.[35]

B.(8) Newsom-Horrigan

Black checker Juanita Newsom and white checker Diana Horrigan audited the Heights office of Hilltop in mid-October 1978. Mrs. Newsom dealt with Leo Lee[36] on the evening of Wednesday, October 18, 1978. The next morning, October 19 at 9:30 a.m., Mrs. Diana Horrigan met with John Mayfield.

As arranged, Mrs. Newsom met with Mr. Lee at the Heights office of Hilltop at about 1:30 p.m., Thursday, October 19, 1978. Mr. Lee asked Mrs. Newsom the area in which she was looking for a house. Mr. Lee testified that she wanted the eastern suburbs, and when he asked her to name communities, she indicated she was not interested in Shaker Heights, but mentioned University Heights, South Euclid, Lyndhurst, Mayfield (Heights), Cleveland Heights and Beachwood. She said she was looking for a home in the low seventies that was 30 years old or less.

---

35. Mr. Hott made certain positive comments about Cleveland Heights. Thus, Mrs. Bartoo made a note:

> While looking at houses, mention was made that he thought I had more house for the money on Coleridge Road than anything he could show me in the mid-50's in the Lyndhurst —South Euclid area.

At another point he said he thought Coleridge was in a great area.

36. Mrs. Newsom testified that she was "to try and get to see Mr. Mayfield." While she first met Mr. Mayfield on entering the Heights office, two or three minutes later, Mr. Leo Lee began to service her and thereafter acted as the agent with whom she dealt.

Mr. Lee obtained computer print-outs on two homes in Beachwood, two homes in Lyndhurst, one home in Mayfield Village, two homes in South Euclid, three homes in Richmond Heights, and two homes in Mayfield Heights. Mr. Lee and Mrs. Newsom looked at the listings and deleted some because they did not fit her specifications.[37] Through this process of selection and elimination, six homes remained on the list. Two were on Concord Drive in Beachwood, and one each on Clearview Road in Lyndhurst, SOM Center Road in Mayfield Village, Monticello Boulevard in Richmond Heights, and Birchwold Road in South Euclid. Because Mrs. Newsom was going to be out of the city for the next three days, arrangements were made to meet at 10:00 a.m. on Monday, October 23 to see homes.

The following appears in Mr. Lee's notes:

Monday, 10:00
to see houses

Make appts Sunday

Based on this note he stated, "I was supposed to make those appointments on Sunday to see houses on Monday." It is unclear when he made the appointments. Asked whether he recalled whether he had "three or four days to make those appointments," he answered, "No." He further testified he "couldn't get an appointment for the other numbers," *i.e.*, other than the two properties on Concord and the property on Birchwold. However, two of the remaining three homes for which he says he could not get appointments were Hilltop listings (the home on

37. While Mrs. Newsom spoke of "specifications," the court does not believe that her specifications included a minimal dining room width of nine feet as testified to by Mr. Lee. Mrs. Newsom's denial of this purported specification is credited.

Clearview in Lyndhurst and the home on SOM Center in Richmond Heights). Mr. Lee did not provide a satisfactory answer for his failure to make appointments to see these two homes.[38] Furthermore, defendants did not offer any other evidence to explain the failure of Mr. Lee to secure appointments for these two Hilltop-listed homes. Thus, it was Mr. Lee who actually picked the homes that he showed to Mrs. Newsom.

Mr. Lee testified that he still does not know today "the specific make up of the [Concord-Beacon] community." Mrs. Newsom saw a black woman across the street from the first home visited on Concord. On the evidence in the record, the court finds that the Concord-Beacon area was substantially integrated in 1978[39] and that despite his professed lack of knowledge of the "specific makeup of that community," Mr. Lee knew black families resided in that area. The court finds that Mr. Lee showed Mrs. Newsom two homes on substantially integrated Concord Drive without making an effort to show her the two Hill-

---

38. At one point he testified:

> The reason I didn't get appointments for others is the real estate company didn't answer, and I couldn't get in at that time.

Certainly this reason would not apply to the Hilltop listings. With reference to the non-Hilltop listing, he stated that inability to get the key was not the reason for him not getting an appointment. When asked fhat that reason was, plaintiffs objected on the ground that it would call for hearsay evidence, and the court sustained the objection.

39. When testifying as to the integrated nature of the "Water Tower" area of Beachwood, Barbara Roderick said that in the early 1970's the black population was "somewhere between 25 and 50 percent." Concord and Beacon Drives make up the Water Tower area. Further, in census blocks 519 and 520, blocks which each contain both Concord and Beacon, black populations were 80 percent and 62 percent, respectively, according to the 1980 census. These percentages contrast with an overall 6.9 percent black population in Beachwood, according to the 1980 census.

top listed homes on unintegrated Clearview and SOM Center Roads, which also met her specifications.

Moreover, sales agent John Mayfield on October 19 showed to white checker Horrigan the house at 1218 Cordova in Mayfield Heights, a home on Mr. Lee's computer print-out which Mr. Lee did not show to Mrs. Newsom. Mr. Mayfield also showed Mrs. Horrigan the home at 1204 Ford in Lyndhurst, a home on Mr. Lee's computer print-out which he did not show to Mrs. Newsom.[40]

Mrs. Newsom testified about a conversation with Mr. Lee which took place in the office when they were looking at the computer print-out. At that time, she said Mr. Lee stated that "Mayfield Heights was an all-white community and would I be comfortable in an all-white community." She responded "yes" to this question. Asked on cross-examination if he made this statement, Mr. Lee stated:

> I asked her as we were driving down Ridgebury Road in my car, about Iroquois [Mayfield Heights] which is a street, I actually asked her how she felt about living in a mostly white community.

Since Mrs. Newsom's recollection of Mr. Lee's statement that it was made in the office was recorded by her in her auditor's report on the day of the visit to the office, and Mr. Lee's recollection was based solely on his memory of a 1978 event, her recollection is credited.[41] The court

---

40. The dimensions of the Cordova home dining room are 8 x 11 and the dimensions of the Ford home dining room are 9 x 12. Mrs. Newsom testified that dimensions of a dining room were not a factor in the selection of homes and that it was Mr. Lee who struck out the Cordova and Ford homes.

41. Mr. Lee's testimony that homes were viewed in Mayfield Heights, Lyndhurst and South Euclid before he drove to Concord

(Continued on following page)

concludes that Mr. Lee made the racial statement as reported by Mrs. Newsom.

Thus, Mr. Lee failed to show at least two homes on the list of homes which he and Mrs. Newsom selected; yet those homes were shown by Hilltop sales agent Mayfield to Mrs. Horrigan, Mrs. Newsom's white counterpart checker. Defendants gave no reason why Mr. Lee could not make appointments for these homes or the Hilltop listed homes on Clearview and SOM Center Roads, which also met her specifications. The weight of the foregoing facts are not outweighed by Mr. Lee's showing of the Birchwold house in South Euclid. Based on this conduct of Mr. Lee and his racial statement to Mrs. Newsom, it is concluded that this strong evidence establishes that Mr. Lee racially steered Mrs. Newsom away from homes which were available in less integrated areas of Beachwood and other communities she requested, to the substantially integrated Concord-Beacon area of Beachwood. This conclusion, because of its strong underlying evidence, is not rebutted by Mr. Lee's later offer to show Mrs. Newsom additional homes.

Footnote continued—

Drive, is directly disputed by Mrs. Newsom. She testified that Mr. Lee and she drove in his car directly from the Heights office of Hilltop to the properties on Concord, stopping only to pick up keys for the houses at the Guggenheim Realty office near Cedar and Green Roads. She recorded in her audit report that they arrived at the first house at 10:45 a.m., having left the realty office shortly after 10:00 a.m. Mr. Lee testified that before going to visit the homes on Concord, he toured Mayfield Heights, Lyndhurst and South Euclid pointing out homes to Mrs. Newsom. His estimate of the time consumed varied from an hour and a quarter to two hours. Yet while agreeing that he and Mrs. Newsom did not leave the Heights office until 10:00 a.m. or a little after, he says that he "couldn't say that [Mrs. Newsom] is inaccurate" if she said that they got to Concord at 10:45. Mrs. Newsom's testimony that he did not drive her through Mayfield Heights is credited.

Nevertheless, although Mrs. Newsom was steered to a substantially integrated area in Beachwood, there is no evidence which shows she was steered into Cleveland Heights. Because plaintiffs have failed to prove that this racial steering incident was steering into Cleveland Heights, plaintiffs may not rely on this audit to establish their claim of racial steering. However, the court does consider this incident, see *infra* p. 122 [A141].

This court has previously ruled in its memorandum and order of March 17, 1983 that in the audit of the Heights office of Hilltop by white checker Diana Horrigan, the "black statue - white statue" remark of sales agent John Mayfield "does not constitute a violation of section 3604(a) or any other provision of the Fair Housing Act." See *infra* p. 167 [A175]. Plaintiffs have again raised the legality of that remark. For the reasons stated in its previous ruling, this court reaffirms its conclusion.

B.(9) Jones-Radgowski

Black checker Constance Jones and white checker Roseanne Radgowski were counterparts in auditing Evelyn Gardner, sales agent at Hilltop's Hillcrest (Lyndhurst) office. Each checker had no independent recollection of the audit, and each refreshed her recollection by reading the audit report. The audits by Mrs. Radgowski and Mrs. Jones were conducted in 1978 on October 20 and October 21, respectively. Both checkers completed their audit reports immediately after the conclusion of the audit.

The specifications for housing which each checker asked for, as listed on their site visitation forms, were substantially the same. Each asked for a three-bedroom house with a two-car garage. Mrs. Jones asked also for a TV room while Mrs. Radgowski asked for a family room.

Mrs. Jones asked for a newer house, less than 30 years old, while Mrs. Radgowski asked for a house "post-1945."

With respect to the location of the housing sought, the site visitation assignment form indicated that Mrs. Jones was to ask for homes in the eastern suburbs while Mrs. Radgowski was to ask for homes on the east side. As a reason for moving, Mrs. Jones specifications included "new job," employer was "GE." As Mrs. Radgowski's reason for moving, the form stated "want to be in eastern suburbs," and inserted above was a note, "a little south of Mentor." When her recollection was refreshed on cross-examination by deposition testimony, Mrs. Jones agreed that she had told Mrs. Gardner that she and her husband were moving to be close to his new job at GE in Nela Park. In mentioning Nela Park as the location of the GE plant, Mrs. Jones augmented the "reason for moving" specification, yet she acknowledged that she had been instructed not to deviate from that "whatsoever."

Connie Jones was shown three homes, one on Grosvenor in South Euclid, another on Bayard in South Euclid, and a home on Quilliams in Cleveland Heights. A computer print-out gives the specifications of each of these homes. The street atlas in evidence shows that Nela Park is approximately one mile from the Quilliams Road home, 1 7/8ths miles from Bayard, and 2 1/2 miles from Grosvenor. Mrs. Gardner testified that she showed Mrs. Jones other streets, for example, Merrymound and Freemont. She said that other homes "were within [her] list of appointments," but "[they] just didn't get in all of them."

On the next day, Mrs. Gardner called back. She had given Mrs. Jones the lengthy computer list and suggested that she show it to her husband. As noted on the prospect

interview record, Mrs. Jones informed her that they were "not interested, husband decided not to move."

In overruling defendant Evelyn Gardner's Fed.R.Civ.P. 41(b) motion at the end of the plaintiffs' case, this court noted that the admissions of Connie Jones, relating to their reason for moving, "would have a bearing on the sales person's selection of 656 Quilliams as a home for Mrs. Jones to see since it is close to Nela Park." This conclusion is reinforced by testimony of Evelyn Gardner and particularly by the information contained on the "prospect interview record," which she prepared on or about October 23, 1978 relative to her interview of Connie Jones. Under the heading "Location Desired," Mrs. Gardner inserted "C Hts S Euclid Nearer To Noble [Nela Park] GE." In her testimony, Mrs. Gardner testified that she showed the properties in South Euclid to Mrs. Jones because her emphasis "was on the proximity and closeness of a bus line to Nela Park GE." The Warrensville Center - Noble Road bus line was direct while buses from Lyndhurst to the Noble Road GE plant involved two transfers. Mrs. Jones, on deposition, agreed that Mrs. Gardner showed her both the Grosvenor home and the Bayard home because it was "fairly close to GE."[42]

Based upon all the evidence, the court concludes that Mrs. Jones indicated to Mrs. Gardner that she and her

---

42. In the housing suitability questionnaire, in answer to whether the agent mentioned good transportation, Mrs. Jones answered "no" as to both the Grosvenor home and the Bayard home. But at another point, with reference to the Bayard home, Mrs. Jones responded:

> Only that she pointed out some of the good points, such as *transportation,* schools and etc., but that's it. [Emphasis added.]

In balance, Mrs. Jones' testimony does not overcome Mrs. Gardner's testimony that the Grosvenor and Bayard homes were close to a bus line to Nela Park.

husband wanted to move to be nearer to his new place of work at GE Nela Park. Under these circumstances, it is concluded that the inference of racial steering that was permissible at the end of plaintiffs' evidence[43] is now fully rebutted. In addition, the unavailability of other homes for inspection on October 21 and Mrs. Jones' unwillingness to see any additional homes beyond the three that were seen further supports the finding that Mrs. Gardner did not racially steer Mrs. Jones. Mrs. Jones at several points in her testimony acknowledged the courteousness of Mrs. Gardner and stated that she was satisfied with the treatment that she received from Mrs. Gardner.

The court turns to the issue of whether Evelyn Gardner steered white checker Roseanne Radgowski by selecting all Lyndhurst homes to show her. On cross-examination, Mrs. Radgowski was confronted with testimony that she gave at her deposition. Recalling that Mrs. Gardner asked her why she was interested in moving, she stated in her deposition, "I think I told her that I wanted to be closer to relatives." At trial, she agreed that she "might have" told Mrs. Gardner that she "wanted to move to be closer to [her] parents or relatives" though she did "not remember for a fact." When asked if that "deviated from the instructions given to you," she answered:

> Well, we were also instructed to be plausible home seekers, and I guess I felt at that time, if I did say that, that that was what I was trying to do.

---

43. At the conclusion of the plaintiffs' case, this court concluded that

> the locational contrast as to the homes shown Connie Jones and her counterpart Roseanne Radgowski are sufficient to permit an inference of locational steering with reference to both checkers. Therefore, Evelyn Gardner's motion for dismissal with prejudice is overruled.

The court concludes that she did make such a statement to Mrs. Gardner when asked why she was moving from her Mentor home, and this was a material deviation from the specification given her.

Evelyn Gardner described her introductory conversation with Mrs. Radgowski in the Hilltop Lyndhurst office. Mrs. Radgowski explained that she lived in Mentor, that she and her husband were interested in looking at homes, and that "she had just dropped her kids off at her mother's house." Mrs. Gardner said she responded, "Oh. Where does your mother live?" To this, Mrs. Radgowski stated, "Right around here. That's why we'd like to look at homes, because we'd like to live near my mother right around here." At the same time, Roseanne Radgowski indicated a circle with her hands. Asked why she did not show homes in Cleveland Heights to Mrs. Radgowski, Mrs. Gardner answered, "Because it was indicated that she wanted Lyndhurst, and that's all I showed her."[44]

Weighing the testimony of Roseanne Radgowski and Evelyn Gardner as well as other relevant evidence, it is concluded that Evelyn Gardner showed homes to Mrs. Radgowski in Lyndhurst because she reasonably believed

---

44. Mrs. Radgowski recalls that Mrs. Gardner asked her to look through "the book" and she did. In a conversation that followed, Mrs. Radgowski quotes Mrs. Gardner as saying "she thought Lyndhurst would be my kind of town, with small children and all." Mrs. Gardner said that she made the statement during a conversation in regard to the home on Marion. She said that Mrs. Radgowski "liked the idea that it was basically a private-type street with a park-like setting." She said that in reaffirmation of the idea that Mrs. Radgowski liked the house

> and the extra amenity was a nice playground and thus sort of an extra push, and being a salesman and wanting to sell the property and make some money, I merely said, "this is your kind of town."

Mrs. Gardner's statement was consistent with her belief that Mrs. Radgowski wanted to buy a home in Lyndhurst.

Mrs. Radgowski was only interested in buying a home in Lyndhurst. Upon consideration of all the evidence, it is determined that the inference of racial steering which this court drew at the end of the plaintiffs' evidence is fully rebutted. Plaintiffs have failed to establish that Evelyn Gardner engaged in racial steering in her dealings with black checker Constance Jones and white checker Roseanne Radgowski.

B.(10) Johnson-Rust

On October 26, 1978, black checker Marion Hortense Johnson began an audit of Elayne Liff, an agent of Hilltop's Hillcrest (Lyndhurst) office. On October 25, 1978, Mrs. Johnson's white counterpart, Susan Rust, began her audit of Mary Booher (formerly Hasselbach), also an agent of Hilltop's Hillcrest office.

Mrs. Johnson refreshed her recollection from her audit report before testifying.[45] Asked if she remembered the conversation about her housing needs with Mrs. Liff without looking at the documents, she answered:

> Maybe I can remember some of them. I wanted to look at houses in the price range of $70,000 to $75,000. I needed three to four bedrooms and maybe a den; a two-car garage. Normally I would ask for a fireplace if it was possible.

---

45. Mrs. Johnson's credibility is suspect due to seven false answers to questions on her March 1978 auditor application to Heights Community Congress and her nine false answers to questions on her fall 1978 auditor application to Heights Community Congress. Hence, her statements are accepted as credible only where they are corroborated by her audit report or are against her interest or the interest of the Heights Community Congress. Mrs. Liff has a poor memory of her meeting with Mrs. Johnson, and her statements are accepted only where corroborated and not self-contradictory.

As to the location she sought, she answered, "Well, I was seeking a house in the eastern suburbs, near Richmond Mall, not too far out, but maybe in the Heights area." She stated that she told all of this to Mrs. Liff.

Hilltop counsel asked Mrs. Liff whether Mrs. Johnson indicated "what area she was interested in." Mrs. Liff responded: "I don't think so. I don't think she did at the time. I can't just remember that." However, on cross-examination, City's counsel asked Mrs. Liff if Mrs. Johnson's statement that she was "looking for the Heights and Hillcrest area and particularly around the Richmond Mall area" would refresh her recollection, Mrs. Liff answered, "If you say that she asked me, sir, it's very possible. I cannot remember specifically."[46] Since Mrs. Johnson contemporaneously recorded what she told Mrs. Liff about the area in which she wanted to look and Mrs. Liff did not deny that Mrs. Johnson made the statement, it is concluded that Mrs. Johnson told Mrs. Liff that she was looking for a house "near Richmond Mall, not too far out, but maybe in the Heights area."

Mrs. Johnson's mention of a house "near Richmond Mall" was broad enough to include Richmond Heights in which the mall is located and Lyndhurst and South Euclid. These municipalities are adjacent to Richmond Heights and "not too far out." Mrs. Johnson's mention of the "Heights area" was also broad enough to embrace Cleveland Heights. Hence, Mrs. Johnson's area specifications permitted Mrs. Liff to attempt to show her the home on Langton Road in Cleveland Heights owned by a black family, broker Isaac Haggins and his wife. Both Mrs.

---

46. While her memory about her meeting with Mrs. Johnson was limited, Mrs. Liff did recall that Mrs. Johnson told her "she wanted three or four bedrooms, and a fireplace, specifically a fireplace."

Johnson and Elayne Liff agreed that Mrs. Liff attempted to locate Mr. Haggins in the Hilltop offices to arrange for a showing of the Langton Road home.[47] Mrs. Liff returned to Mrs. Johnson with the report that the Haggins' house had been taken off the market.

Because Mrs. Liff attempted to show the Haggins' home to Mrs. Johnson on October 26, it was contradictory for Mrs. Liff to testify that she did not make arrangements to show Mrs. Johnson homes

> because [Mrs. Johnson] was in a hurry. She—I hope I remember correctly, that she was to pick up a child somewhere. I thought that's what she told me.

This statement is also contradicted by Mrs. Liff's testimony that she probably asked Mrs. Johnson "how many there were in her family, if she had children," but she didn't "recall whether she said she had children or not." Upon consideration of all the relevant evidence, it is concluded that Mrs. Johnson did not tell Elayne Liff that she was in a hurry, nor did she tell her that she had to pick up a child. Thus, there was no basis for Mrs. Liff to say, "I don't think she actually wanted to see houses that particular day."[48]

---

47. Mrs. Liff had been showing the Haggins' home. She knew it had several fireplaces, an amenity requested by Mrs. Johnson. This was an additional reason for attempting to show her the Haggins' home.

48. At best, her conclusion was merely a supposition. Mrs. Liff was asked, "But she didn't tell you that she wouldn't look at houses, did she?" She answered, "No, but her actions indicated that she wasn't interested."

This cross-examination contradicted Mrs. Liff's answer on direct examination that Mrs. Johnson had given an excuse as to why she did not want to see houses that day:

> She wasn't interested in seeing houses that particular day . . . she used some kind of excuse, I think she had to pick up a child, if I remember correctly.

Agent Liff stated that she was suspicious of Mrs. Johnson, and gave this explanation:

> [S]he kept insisting that her husband had gotten my name at a party the night before. And, of course, that made me suspicious, because I don't think my name is thrown around at parties. And I just was suspicious of the lady.[49]

Mrs. Johnson's "story" reasonably warranted Mrs. Liff in being "suspicious" of Mrs. Johnson. Despite her suspicion, Mrs. Liff stated that she "still went about [her] business in the usual manner." The court concludes that there was no basis for Mrs. Liff to not show homes to Mrs. Johnson on the afternoon of October 26, and had Mrs. Liff gone about her business "in the usual manner" she would have obtained listings to suit Mrs. Johnson's specifications.

To determine whether this variance in Mrs. Liff's usual course of business can be construed as a section 3604(a) violation, the treatment of Mrs. Johnson must be compared with the treatment of her white counterpart, Susan Rust, who had generally the same housing requirements. On October 25, Susan Rust requested that agent Mary Booher of the Lyndhurst office of Hilltop show her homes in the low $70,000 price range. Mrs. Johnson asked Mrs.

---

49. Mrs. Johnson had been given a story to tell as to why she had picked Mrs. Liff. She stated:

> If she was going to ask me how I chose her as the person, I was going to tell her that I had met some friends at a party who had purchased a home from her, and that was my interest in her being my agent.

While Mrs. Johnson did not recall telling Mrs. Liff why she had picked her, the story that she was told to give Mrs. Liff, if she was asked, was similar to Mrs. Liff's positive recollection of Mrs. Johnson's explanation for choosing her. This makes it convincing that Mrs. Johnson told Mrs. Liff what Mrs. Liff recalls.

Liff of the same office to see houses in the price range of $70,000 - $75,000. Each asked for a three or four-bedroom house, a two-car garage, and either an extra room or a den. Mrs. Johnson added a fireplace "if it was possible." Agent Booher testified that there were approximately 30 houses in the computer fitting the specifications of Mrs. Rust that were available for sale on October 25. Mrs. Liff agreed that had she gone to the computer and "punched in the Heights area and the Hillcrest area in October, 1978," she "probably would have found at least 30 homes" which fit the specifications of Mrs. Johnson.[50]

Defendants argue that the "Rust audit of Booher-Gardner simply cannot be compared with the Johnson audit of Liff" because

> Ms. Booher had almost seven hours of lead time to arrange showings for Ms. Rust, whereas Ms. Liff had none prior to Ms. Johnson's arrival that afternoon.

However, agent Booher said she used no more than three and a quarter hours to obtain the computer listings used to select those homes for which appointments were arranged to show to Mrs. Rust.[51] While it seems likely that Mrs. Liff could have successfully obtained appointments for some houses to be shown to Mrs. Johnson on the afternoon of Thursday, October 26, had she done noth-

---

50. The computer print-outs furnished to Susan Rust by agent Booher included homes with a fireplace, an amenity added by Mrs. Johnson to her own specifications.

51. Mrs. Rust called the Lyndhurst office about 9:10 a.m. at which time she gave her housing specifications. After accomplishing everything necessary to make up the list of houses to be shown, Agent Hasselbach left the office for a meeting with her lawyer scheduled for 12:30-1:00. However, she fixed 3:30 as the time for Susan Rust to meet her at the office, apparently to allow time for her to conclude her business before returning to the office.

ing more than display the multiple listing book she would have taken some steps towards showing her available housing. Mrs. Liff said this would be her "normal procedure." Mrs. Johnson testified that Mrs. Liff did neither. Further, Mrs. Liff does not remember even showing her a multiple listing book.

Instead, on Thursday, October 26, Mrs. Liff told Mrs. Johnson, according to her audit report, "she would check my needs and get back with me." Having received no call "in the [four] interim days," Mrs. Johnson called Mrs. Liff at her office on Monday, October 30. Mrs. Johnson reported that whoever answered the phone said "hold on for a minute." The person then said to her that Mrs. Liff was not in—"do you want to leave a message?" Mrs. Johnson responded "yes, to return my call." Late on the next afternoon (Tuesday) Mrs. Liff called Mrs. Johnson. Mrs. Johnson reported:

> That day she was very busy preparing herself for a trip to Hawaii and was telling me about that, and she really hadn't had time to check over her computer print-out or her listings for me, but as soon as she returned she would get back with me.

After acknowledging the existence of "the buddy system," Mrs. Liff testified that she thought "most of [her] buddies went on the trip with [her]." She was then interrogated:

> Q. So if you had asked someone to take care of this lady while you were away—Hortense Johnson—they would of done it, wouldn't they?
>
> A. I would have under normal procedures, sir, but I don't remember.

Q. You don't remember whether you asked anyone or not?

A. I don't believe I did.

In contrast, agent Booher arranged for agent Evelyn Gardner to meet Sue Rust should she not return to the office at the appointed hour. When agent Booher did not return, agent Gardner showed Mrs. Rust the homes that had been selected and arranged another appointment for her with agent Booher.[52]

Agent Liff mentioned only one home for possible showing to Mrs. Johnson and that was owned by a black family on Langton Road in the Oxford School district of Cleveland Heights. Further, by Tuesday afternoon, October 31, five days after Mrs. Johnson first met with Mrs. Liff, no other homes were suggested to Mrs. Johnson for possible showing. In addition, agent Liff did not arrange for another agent to show homes to Mrs. Johnson when Mrs. Liff departed for a week's vacation, contrary to Hilltop's "buddy system" policy. It is determined, therefore, that agent Liff denied showing available homes[53] to Mrs. Johnson on the basis of race, a violation of section 3604(a).

A question has been raised as to whether a statement made by Evelyn Gardner while showing Sue Rust a home

---

52. In another audit, Hilltop agent William Howard had to leave town while servicing white checker Caron. Before leaving, he referred Mr. Caron to Hilltop agent John Mayfield who showed him a home while Mr. Howard was away on vacation. The actions of agents Booher and Howard imply a policy on the part of Hilltop agents to assure that prospective buyers are not inconvenienced by the unavailability of their agents.

53. As a partner of agent Booher, agent Evelyn Gardner showed four homes to Mrs. Rust in University Heights, South Euclid, Cleveland Heights and Lyndhurst. On either October 30 or October 31, additional homes, including one near Fairmount and Taylor in Cleveland Heights and one on Anderson Road in South Euclid were shown by agent Booher to Mrs. Rust.

in Forest Hills at 2065 Lee Boulevard[54] violates section 3604(a). Mrs. Rust asked the owner what schools the children would go to, and the owner answered, "Well, this is a private school area, and the agent told me to say that." The owner was referring to the listing agent (a broker other than Hilltop). In the car, after leaving the Forest Hills home, Mrs. Rust said that she asked agent Gardner about the schools that the children would be attending in East Cleveland, and "Evelyn said that the East Cleveland schools were not as well rated." Mrs. Gardner recalls that when they got back in the car, Mrs. Rust made some reference to the owner's remark that "this was a private school area." Mrs. Gardner said that she responded:

> East Cleveland schools were not rated as highly as Cleveland Heights or South Euclid—Lyndhurst schools. Those were the two areas she was looking at also. And I said that's based on the SAT scores and academic scores and things like that.

On cross-examination Mrs. Gardner stated that

> I told her what I had read [in a newspaper article]; it was not my opinion.

She was later asked on cross-examination "the only reason you are stating that this might not, that this wouldn't be considered steering, is because race wasn't mentioned?" She answered:

> Here again, it is a response, not—I want to say this just right. It is a response to a question rather than

---

54. While this home is in East Cleveland close to the Cleveland Heights city limits, it printed out from the computer when programmed for the northerly part of Cleveland Heights. Mrs. Booher did not know that the home was actually located in East Cleveland.

information put out with the intent to change the situation.[55]

Answering inquiries of a home seeker in a responsive and helpful manner would seem to be essential to selling or brokering real estate. If the home seeker receives an accurate response, it aids the person in making a housing choice. Moreover, an answer or other statement not made to deny housing based on race is not violative of section 3604(a).

The statement of Evelyn Gardner would be violative of section 3604(a) only if it might reasonably influence a housing choice on the basis of race, color or national origin. In this case, race was not expressly mentioned or implied in Evelyn Gardner's answer. Therefore, plaintiffs have failed to prove that Evelyn Gardner's answer to Susan Rust's query violated section 3604(a). Moreover, plaintiffs have not shown that in providing service to Susan Rust, either agent Gardner or agent Booher racially steered Mrs. Rust or otherwise violated the Fair Housing Act.

B.(11) Riggs-Butterfield

Hilltop Realty sales agent Sandra Goldberg conducted an open house on Sunday afternoon, November 19, 1978

---

55. Hilltop's instruction to its agents, incorporated in president Aveni's civil rights lecture during Hilltop's central training program, is to refer to city hall or other knowledgeable government agencies any question about racial composition of a neighborhood or of a school district. A salesperson's compliance with this instruction would not violate section 3604(a)'s prohibition against making "unavailable or deny[ing] a dwelling to any person because of race, color . . . or national origin."

Evelyn Gardner might have followed president Aveni's instruction in responding to the question of Susan Rust, prompted by the owner's comment at 2065 Lee Boulevard. Her failure to follow this procedure does not resolve the legality of her statement.

at 3258 Berkeley Road, Cleveland Heights. Her mother, Shirley Bernstein, also a Hilltop sales agent, sat in at the open house for her. Mrs. Patty Riggs, a black checker, and Mrs. Hester Butterfield, a white checker, visited the open house to audit Mrs. Bernstein.

Mrs. Butterfield arrived at the open house at 4:45 p.m. and left the open house at 5:30, according to her audit report. Before Mrs. Butterfield left, she and Mrs. Bernstein made an appointment for Mrs. Butterfield to come to the Hilltop office to go through the multiple listing book.

Mrs. Butterfield and Mrs. Bernstein agree that they met at the Hillcrest (Lyndhurst) office on Monday evening at which time selection of houses occurred.[56] Mrs. Butterfield remembers saying ". . . that we were looking . . . in areas that would allow us access to the recreation programs in those three cities [Cleveland Heights High, Shaker High and Brush High]." It is concluded that she told this to Mrs. Bernstein on Sunday afternoon at the open house. Mrs. Butterfield said that

> when I got to her office, she had already picked the homes, she had marked them in the book for us to look at, preliminarily, and we looked through them and commented on them.

She said that Mrs. Bernstein would have "volunteered me many more. We ended up with three." One of these homes was on Eastway in South Euclid. When an appointment could not be arranged for that home, Mrs. Bernstein arranged to show a home on Elmwood in South Euclid.

---

56. Mrs. Butterfield first testified that they met on Tuesday night. But she later determined the house selection occurred on Monday evening, and the home visitation took place on Tuesday evening.

On the next night, Tuesday, Mrs. Bernstein showed Mrs. Butterfield the Elmwood home and homes on Powell Road and Cedar Road in Cleveland Heights.

Bearing in mind that two out of the three houses which Mrs. Bernstein showed to Mrs. Butterfield were in Cleveland Heights, it is concluded that any claim that Mrs. Butterfield was steered away from Cleveland Heights is not supported.[57]

Turning to the audit by Patty Riggs, according to her audit report from which she refreshed her recollection while testifying, she stated she arrived at the Berkeley Road open house at "4:00 o'clock" and left the open house at "4:50." Mrs. Riggs testified that she and a white lady arrived at the open house at the same time, and the agent asked both of them into the house and took their names. She said that once the white lady left, the agent asked her what she was looking for, and she told her "homes in Lyndhurst, South Euclid or Cleveland Heights." However, she admitted she told the agent that she might want to rent her "old house" which was on Oak Road in Cleveland Heights. Mrs. Riggs agreed that the agent said it would be nice if she could be close by to watch over the property that she would be renting. The record does not show that Mrs. Riggs rejected this suggestion. Thus, she left the impression that she was primarily interested in Cleveland Heights.

---

57. Mrs. Butterfield recalls Mrs. Bernstein saying:

> I don't want to steer you, but you get a lot more house for your money in the Heights area because those are old, well maintained, solid homes that professional people in the past have been living in and finishing, putting paneled rooms in, so forth.

In view of the conclusion that Mrs. Butterfield was not steered, it is unnecessary to review the details of the selection process, which the evidence revealed was a joint affair.

Four homes were selected to be seen. One was on Elmwood in South Euclid while three were in Cleveland Heights on Radnor, Brunswick, and Englewood. On direct examination Mrs. Riggs stated that the agent asked her if she would like to pick out any homes to see, and "eventually, I ended up picking out one house." Her audit report stated, "Four houses were suggested. One I chose and the others she did."[58] The home Mrs. Riggs chose was on Radnor.

Hilltop sales agent Sandra Goldberg, Mrs. Bernstein's daughter, showed the homes to Patty Riggs. Sandra Goldberg stated that on Sunday evening, November 19, her mother gave her a sheet of paper that "gave me the name, address, phone number and homes that Mrs. Riggs wanted to see." Prior to Tuesday, she made appointments to show the four homes. On Tuesday morning Mrs. Goldberg showed her three of the four homes, the Elmwood home, the Radnor home and the Englewood home. The seller of the Brunswick Road home was not there to let them in, and they did not go inside.

Mrs. Riggs reported in her audit report that at the open house Mrs. Bernstein stated that "there were also homes available in East Cleveland that I could see, and the school district there was Caledonia School." This referred to a conversation at the open house. At trial Mrs. Bernstein was asked by her counsel, "At the open house,

---

58. Mrs. Riggs stated that the reason she "deviated from [her] instructions [not to pick out houses] was because the agent was so persistent in asking that [she] pick out a house." The Radnor home Mrs. Riggs picked out was the first house chosen as a possible house for her to see. She was then asked:

> You are not sure whether any other houses were selected as possibilities for you to see by the agent at the open house, are you?

She answered, "No, I am not."

was there any suggestion of any homes in East Cleveland by you?" She answered, "No. There was no reason for it, no." She was further asked, "Did you discuss her living in East Cleveland?" She answered, "No, I did not." These denials are unconvincing. It is concluded, therefore, that Mrs. Bernstein made the statement attributed to her by Mrs. Riggs.

However, Mrs. Bernstein's East Cleveland remark must be weighed in connection with the following facts and not as an isolated incident: Mrs. Riggs left the impression that she was primarily interested in Cleveland Heights; Mrs. Riggs herself agrees she picked out the Radnor home in Cleveland Heights; as seen in an earlier audit, Englewood (one of the homes shown) was in a less integrated area of Cleveland Heights; and Mrs. Riggs was shown a home in predominantly white South Euclid. Therefore, it is found that plaintiffs have not carried their burden of producing facts from which racial steering may be inferred.[59]

This conclusion is corroborated by Mrs. Goldberg's offer to show Mrs. Riggs additional homes in South Euclid, Lyndhurst and Mayfield Heights.[60] Mrs. Riggs refused that offer. This court has found that only infrequently is a home sold to a prospective buyer after seeing only three houses. When, as here, there is an offer to show more than three homes in the requested areas and the

---

59. In view of this conclusion, it is unnecessary to discuss or decide how Mrs. Bernstein's limited vision may have affected the home selection process.

60. During their meeting on November 21, Mrs. Goldberg said she

> offered to show [Mrs. Riggs] homes in South Euclid, Lyndhurst, Mayfield Heights. [Mrs. Goldberg] reiterated the fact that [she] was limited in an hour and twenty minutes on a blizzardy morning and wanted to take her out again.

offer is rejected by the checker, this rejected offer is a further fact which militates against any inference of racial steering.

Upon consideration of all the evidence, it is concluded that Hilltop agents Bernstein and Goldberg did not violate section 3604(a).

B.(12) Jerome Emoff

Plaintiffs offer the experiences of actual home buyers who sought homes through Hilltop agents as further proof of locational steering on the part of Hilltop. Plaintiffs first call attention to a statement made during the summer of 1978 attributed to agent Delores Russo by home buyer Jerome Emoff. Mr. Emoff testified that while he and Hilltop agent Delores Russo were driving on Monticello Boulevard in the vicinity of Forest Hills, Mrs. Russo asked him whether he was "aware that the Forest Hills area was more than one half black."

Mrs. Russo's records of showings to Mr. Emoff reflect that on September 7 (the third time she showed him homes) she showed him two homes on Bradford, one on Woodridge and one on Boynton, all in Cleveland Heights. When questioned about the route she took to drive from the Bradford home to the Woodridge home, Mrs. Russo first denied being on Monticello, and later stated that she did not remember which way she went or whether she drove through the more integrated Forest Hills area. Mrs. Russo also insisted that the two homes shown on Bradford were east of Taylor Road. However, the court judicially notes that the homes at 3246 and 3383 Bradford are actually west of Taylor Road, between Lee Road and South Taylor. Thus, it is concluded that it is likely that Mrs. Russo drove the more direct route from 3246 Bradford

Road (close to Lee Road) via Lee Road and Monticello to Woodridge and that Mrs. Russo and Mr. Emoff were on Monticello in the Forest Hills area, as Mr. Emoff testified.

It is concluded that Mrs. Russo made the statement attributed to her by Mr. Emoff and that in asking a reasonable home buyer if he was aware that the Forest Hills area of Cleveland Heights was more than half black, she intended to influence the housing choices of this buyer on the basis of race. The statement was, therefore, an act of racial steering in violation of section 3604(a).

Section 3604(a) makes it unlawful "even to attempt" to steer on a racial basis, and success in steering is not relevant. See *supra* p. 27. Thus, it is immaterial whether or not Jerome Emoff was discouraged from buying in Cleveland Heights as a result of his discussion with Dolores Russo and that he purchased a home in a neighborhood not far from Forest Hills.

B.(13) Mr. and Mrs. Calabrese

Joseph George Calabrese moved from Rochester, New York in the spring of 1977 to take a position in Cleveland, Ohio. Gallery of Homes, Inc., through whom Mr. Calabrese and his wife Mary were selling their Rochester home, put them in touch with two Cleveland real estate firms, Hilltop and Bishop Realty. Upon contacting Hilltop, the Calabreses dealt with agent Jack Abbott.

The testimony of Mr. and Mrs. Calabrese and agent Abbott indicates that the Calabreses were interested in looking at a home in the eastern suburbs and particularly Cleveland Heights, although Shaker Heights and University Heights may also have been mentioned. Mrs. Calabrese testified that she was fairly certain that in a tele-

phone conversation with someone in the Hilltop office she told the person that she and her husband wanted Cleveland Heights and Shaker Heights. Mr. Abbott's notes of the conversation of March 8, 1977 mention as to area only "access to downtown—1/2 hr." Mr. Abbott disclosed that the form which he received from Hilltop's referral department stated "eastern suburbs/Cleveland Heights." Mr. Abbott further testified that he asked Mr. Calabrese, "are you interested primarily in Cleveland Heights?" He said that Mr. Calabrese replied, "Oh, no, no. I want to see all the eastern suburbs." It is concluded that the Calabreses requested to see the eastern suburbs, including Cleveland Heights.

The Calabreses came to Cleveland on a Saturday at the end of March. Mr. Abbott arranged to show them homes. Mr. Calabrese recalled that they saw seven or eight homes, while his wife said they saw five or six. One home was on Cummings Road in Cleveland Heights, and the rest were in Lyndhurst, Mayfield Heights, and South Euclid. Mr. Calabrese stated that among the reasons he did not like the Cummings Road home was that he has two small children, and there was a ravine close to the back door. Hence, the only home shown to the Calabreses in Cleveland Heights did not meet Mrs. Calabrese's specification that the home have a "decent size" backyard.

After looking at homes, the three returned to the Hilltop office. When Mrs. Calabrese told Mr. Abbott that they did not like any of the homes and that she would like to be shown other homes, he gave her a multiple listing book to examine. She picked out homes, some of which she believed were in Cleveland Heights. She said that when she asked about specific homes, Mr. Abbott

would go into another room and would come back and say that the house was sold.

Mr. Calabrese testified that after he observed that "Mr. Abbott would walk back and forth, in and out of the office,"

> I got up and met him at the door as he came in, and my wife was still reading the book, going over the book, and I asked him more specifically why he wasn't showing us homes in those three particular towns [Cleveland Heights, Shaker Heights and University Heights]. He asked, how do you feel about blacks, specifically.

Mr. Calabrese then stated:

> I was taken [back] by the question, and I asked him, what did he mean?
>
> He said, did you know that those towns were integrated?
>
> I, at that point, I didn't much listen to him in terms of what other homes he would like to show us.

Asked whether Mr. Abbott said anything derogatory about Cleveland Heights or Shaker Heights, Mrs. Calabrese answered, "not in my hearing." However, she said that her husband told her "about a statement that Mr. Abbott had made that [she] did not hear." Asked what was the statement, she answered, "how do you feel about living near blacks?" Mr. Abbott denied making the statement. When asked if he was certain of that, he answered, "I am positive. I never said that in my life to anyone." For the reasons discussed below, the court concludes that Mr. Abbott did make that statement.

First, no reason is disclosed in the record that would have caused Mr. Calabrese to invent the disputed con-

versation. While it is believed and found that Mr. Abbott and Mr. Calabrese conversed by telephone on March 8, Mr. Calabrese had never met Mr. Abbott before Saturday, March 26. There is no evidence in the record of any personal animus or hostility towards Mr. Abbott that would have motivated or caused Mr. Calabrese to fabricate the conversation. Asked if Mr. Calabrese said anything that would indicate any ill feeling towards him, Mr. Abbott answered, "He didn't actually say anything, no."

Second, Mr. Abbott testified that he "had an ill feeling toward [Mr. Calabrese]" because he "had taken my time." Mr. Abbott said that on Sunday, March 27, he prepared a list of Cleveland Heights homes to show the Calabreses. He called, he believed, "the Smythe Cramer office and asked to show a home that they had listed on Fenley Road in Cleveland Heights." The court did not permit him to give the content of the conversation; however, as a result of that call, he said he did not make an appointment to show that house to the Calabreses. After the Smythe Cramer call, Mr. Abbott said he called Mr. Calabrese and asked him if they would like to look at any more homes. Mr. Calabrese told him, "Well, I'm not really interested in looking any more at this time." Mr. Abbott testified that he said to Mr. Calabrese, "Joe, how did you like the home that you saw this morning on Fenley Road?" He answered, "As a matter of fact we liked that home very much. We're thinking about putting an offer in on it." At this point Mr. Abbott reminded Mr. Calabrese that they had agreed that Mr. Calabrese "was not going to be looking at homes with anyone else and that I was going to be exclusively his agent in this area." The court does not credit these statements of Mr. Abbott.

Through contacts made by the Gallery of Homes in Rochester, the Calabreses made contact not only with

Hilltop Realty but also with Bishop Realty. In view of this, it is improbable that Mr. Calabrese would have entered into an informal, exclusive agreement with Mr. Abbott. Further, other evidence demonstrates that the Calabreses did not believe that they had an exclusive agreement with Mr. Abbott. Mrs. Calabrese testified that on Sunday, March 27, the Bishop Realty agent showed them homes in Cleveland Heights. Further, she testified that they did not see Smythe Cramer until April. It was through Smythe Cramer that they saw five homes in Cleveland Heights, one of which was a home on Fenley that they eventually bought. Thus, Mr. Abbott was mistaken when he testified that on Sunday, March 27 they saw the house on Fenley through Smythe Cramer.

Finally, the reasons given by Mr. and Mrs. Calabrese to Mr. Abbott for the termination of their relationship with Mr. Abbott are consistent with the statement which Mr. Calabrese attributes to Mr. Abbott. Mrs. Calabrese testified that when, at a later time, Mr. Abbott called back to arrange a second meeting, she and her husband told Mr. Abbott:

> We were dissatisfied with his services, and that we had seen some homes from another real estate agent that were more of what we had in mind, that we didn't want him to show us anything else.

Asked to say why they were dissatisfied with his services, she answered:

> Because he wasn't showing us houses that were the type that we liked, or he wasn't showing us houses in Cleveland Heights, and we wondered why.

Based upon the findings of this subsection it is concluded that the statements of Mr. Abbott to Mr. Calabrese

would influence the housing choices of a reasonable prospective home buyer on the basis of race. Both the nature of his statement and his failure to show the Calabreses homes in Cleveland Heights that met their specifications establish racial steering in violation of section 3604(a). Since an attempt to steer is violative of section 3604(a), see *supra* p. 27 [A69], it is immaterial that the Calabreses purchased a home on Fenley Road in Cleveland Heights.

B.(14) Mr. and Mrs. Gordon

As another "steering incident" the plaintiffs offer statements which allegedly were made by Hilltop agent Steven Paul Francis to prospective home buyers Belita Tisder, a black, and Howard Gordon, a white, when they first met with Mr. Francis in late February 1979. Ms. Tisder of Columbus and Mr. Gordon of the Cleveland area were engaged to be married, and Ms. Tisder had five black children from a previous marriage. They were looking for a home to purchase in the Cleveland area. Hereafter called Mr. and Mrs. Gordon, they contacted sales agent Francis after seeing his name in a Sunday newspaper (Hilltop) ad. On the same day they met him at the Hilltop Heights office.

Mrs. Gordon testified that while in the office she told Mr. Francis that she and Mr. Gordon had driven around several communities. She had looked at houses in Lyndhurst and in "Euclid Heights [*sic*]," and she herself preferred a newer house. In response, Mr. Francis told them about an incident that had occurred in the Lyndhurst area:

> He told us that there was a family that lived there—a black family that had moved in the Lyndhurst area, and their children or something in the high school

had been beaten up, and how the family had to sell their house and move, and they had just recently purchased a home.

And he also said that there would be times when something happened at the school where my husband could not go there to represent my kids because of him being white.

Mrs. Gordon said that after he told her about the incident, she "was worried." She then told him:

We did not want to live in a predominantly black neighborhood. We just wanted to live, period.

Mr. Gordon's testimony corroborated her testimony in all essential respects.[61]

Mr. Francis acknowledged the Sunday meeting with the Gordons in the Heights office of Hilltop. He remembered Mr. Gordon was very interested in living in Cleveland Heights, having grown up there. He recalled Mrs. Gordon "had a desire for Lyndhurst, and she also mentioned Chardon." Mr. Francis was asked whether when they met on the first day he said to them "that the children of a black family that had moved into Lyndhurst were beaten up in the high school and that the family had to move." He answered "no." He also denied that he told them that "Mr. Gordon could not go to the high school if they moved into Lyndhurst to represent his kids because he was white."

---

61. Differing from his wife, Mr. Gordon mentioned two black families instead of one, but they both agreed that they were told the child of one family was beaten, and the family left the community. Mr. Gordon said that the conversation with Mr. Francis occurred in the car while they were being shown homes, while Mrs. Gordon stated they were in the office. Despite these differences in the Gordons' testimony, they both agreed that the conversation occurred on the same day.

On the day of their first meeting, Mr. Francis also showed them several homes in Cleveland Heights. Mr. Francis continued to show homes to the Gordons until April 22, 1979, when they entered into a contract through Mr. Francis to purchase a home at 2112 Miramar Boulevard in South Euclid. During the intervening period, agent Francis had shown the Gordons a total of 45 to 60 homes. Approximately 25 to 30 of these were shown only to Mr. Gordon.

Agent Francis testified that the subject of a black child being beaten up at Brush High School (South Euclid - Lyndhurst school district) first came up when Mr. Gordon called him to ask his assistance in getting out of his contract to purchase the South Euclid home. After discussing several financial reasons which Mr. Gordon offered for withdrawing from the contract he said he asked Mr. Gordon "isn't there some other reason?" Mr. Gordon told him

> he had been informed by a co-worker of violence to a student in Brush High School, and that since his kids would be going there if he concluded the sale of that house, that he did not want to be responsible for the safety of his children going to Brush High School.

He stated he was aware "that had happened" because the newspapers had reported "that a student had been beaten in a washroom at Brush High School."

Some time after April 22, 1979 when he and his wife signed an agreement to purchase the South Euclid home, Mr. Gordon stated he had a "phone conversation with Mr. Francis about the fact [they] wanted to get out of this offer." The reasons given by Mr. Gordon for not

wanting to live in the house were "that it went beyond [their] income, and [they] were afraid for the kids." About this time he learned some other information about Brush High School:

> A woman that [he] had casually known at work told [him] that she lived in South Euclid, and the kids would have a rough time in that school system.

He then said "I added [that] to what Mr. Francis had told me earlier," and passed this information along to his wife. Although they had increased their offer on the South Euclid house, as encouraged by Mr. Francis, "a mutual decision" was made by him and his wife to withdraw the offer.[62]

As seen above, Mr. Francis testified that he had told Mr. Gordon he was aware of the Brush High School incident because it had been in the newspapers. Having learned from the newspapers about the Brush High School incident, presumably at the time it happened, it is concluded that Mr. Francis knew about the incident in late February when he first met the Gordons. Mr. Francis also knew that the Gordons were a biracial couple, and in connection with their housing needs he would have known about Mrs. Gordon's children. It is likely and it is determined that Mr. Francis brought up the Brush High School incident at the first meeting when Mrs. Gordon indicated her interest in seeing homes in Lyndhurst. Further, though they were shown 45 to 60 homes, neither on that first day of home visitation nor on any other time did Mr. Francis show them any homes in Lyndhurst even though Mrs. Gordon wanted to see homes in Lyndhurst.

---

62. When Mr. Francis refused to be a party to breaking the contract, Mr. Francis and the Gordons terminated their relationship.

The only reasonable explanation supported by the evidence is that Mr. Francis' story of physical violence to a black student and an inability of Mr. Gordon to represent his children at Brush High School in Lyndhurst deterred the Gordons from pressing Mrs. Gordon's request to see homes in Lyndhurst.[63]

It is concluded that the statement of Mr. Francis made to Mr. and Mrs. Gordon, as Mrs. Gordon reported it, would tend to influence, based on race, the housing choices of a reasonable prospective home buyer seeking housing in Lyndhurst. Volunteering such information in that context would be likely to discourage a reasonable home buyer from pursuing housing in Lyndhurst. Moreover, its intentional nature was expressly acknowledged by Mr. Francis, who told the Gordons "not to say anything about him telling us that, because it would be called steering." Hence, it constitutes racial steering away from Lyndhurst, but the matter does not end there.

Plaintiffs condensed their claim involving the Gordons as follows:

> The testimony of both Belita Gordon and her husband, Howard Gordon, was that the remark about the Lyndhurst family frightened them. . . . The Gordons subsequently purchased a home on Bendemeer in Cleveland Heights. In this action, the influence and effect of racial information by the Hilltop agent had a con-

---

63. Mrs. Gordon's report of Mr. Francis' statement is consistent with her further statement:

> Well, after he told us that story, you know, I guess we really didn't want to look then, because he said—after he told us that story, he told us not to say anything about him telling us that, because it would be called steering.
>
> So we didn't really have any desire to look in Lyndhurst after the story.

crete effect on these homeseekers and constituted a violation of section 804(a).

Plaintiffs seem to be saying that by the statement and acts of agent Francis, the Gordons were not only steered away from Lyndhurst but that they were steered into Cleveland Heights. However, there is nothing about the statement of agent Francis or acts that said or suggested that he was seeking to steer the Gordons into Cleveland Heights. In addition, showing the Gordons 45 to 60 homes in several communities, including South Euclid, the location of the Miramar home which they contracted to buy, refutes any claim that he attempted to steer the Gordons into Cleveland Heights. Because the plaintiffs have failed to prove that this racial steering incident was steering into or away from Cleveland Heights, the plaintiffs may not rely on the incident to support their claim of racial steering.

In sum, in eight separate incidents, Hilltop's agent violated section 3604(a), and these violations were found to have impacted on Cleveland Heights. Each of these violations were committed within the agent's course and scope of employment with defendant Hilltop Realty, Inc. Applying *Marr v. Rife*, 503 F.2d 735, 742, the acts or statements of these agents are imputed to Hilltop.

C. Financial Qualifications

Plaintiffs allege that defendant Hilltop violated the Fair Housing Act by unequally applying its financial qualification procedures based on race. To support their allegations, they present evidence of five HCC sponsored audits and one Cuyahoga Plan audit,[64] all performed in 1978.

---

64. At trial the court ruled that the Cuyahoga Plan audit can only be used to ascertain Hilltop's intent to discriminate. See *infra* note 67.

Plaintiffs assert that these audits are designed to "ascertain whether real estate agents qualified persons equally."

Defendant Hilltop asserts that it did not engage in disparate treatment based on race through its financial qualification procedures. Defendant contends that "differences in the way a set of checkers were treated by two different agents could very easily be attributable to differences in the practices of the real estate agents."

While the court finds that there were differences in the timing and the method of financial qualification by various agents, these differences do not relieve the court of the duty of examining plaintiffs' several claims of unequal application of Hilltop's financial qualification procedures.

Section 3604(a) provides that it shall be unlawful to ". . . otherwise make unavailable or deny, a dwelling to any person because of race. . . ." The language of this section is broad in scope and prohibits all practices which make dwellings unavailable due to race. Accordingly, it prohibits "the imposition of more burdensome applications procedures, of delaying tactics, and of various forms of discouragement." *Zuch v. Hussey*, 366 F.Supp. 553, at 557 (E.D. Mich. 1973). *Accord, Williams v. Matthews*, 449 F.2d 819, 826 (8th Cir. 1974); *U.S. v. Youritan*, 370 F.Supp. 643, 648 (N.D. Cal. 1973), *aff'd in relevant part*, 509 F.2d 623 (9th Cir. 1975).

However, the mere requirement process of financially qualifying a buyer can hardly be considered to be either a form of discouragement or an unwarranted imposition. All prospective home buyers should expect to be asked questions pertaining to their financial capability. It is only when those questions or comments are racially moti-

vated and used in a disparate fashion that the financial qualifying process would become the "more burdensome application procedures" or "form of discouragement" that the statute disallows.

On April 4, 1978, black checker Anita Perry and white checker Linda Blaser audited the Hilltop office at 3950 Mayfield Road. Mrs. Perry was qualified by agent Phyllis Williams while Mrs. Blaser was qualified by agent John Mayfield.

Checker Perry testified that agent Williams asked about her husband's income and employment and whether they owned a home. Though it is not clear from Mrs. Perry's testimony who initiated it, there was "a discussion about the down payment [they] would be required to make or that [they] had available to make." Checker Perry further testified that Mrs. Williams "said we would go into the financing after we had found the house."

The white checker Blaser testified that the only financial qualifying question John Mayfield asked her was about her husband's employment. Mr. Mayfield also offered his assistance in obtaining financing. Although the black checker was asked more qualifying questions than was the white checker, these questions were race neutral and were ones which the agent might reasonably believe would help him determine the prospect's financial ability to buy a house.

In their April 10, 1978 audit of Hilltop's Lyndhurst office, checkers Perry and Blaser saw agents Bill Weir and Vi Costello. Checker Perry testified that agent Weir asked her about her occupation, her and her husband's income, their debts and obligations, and whether they owned and planned to sell their present home. Though she did not indicate who intiated it, Mrs. Perry testified

that she and agent Weir discussed the amount of down payment available. She also said that Weir offered to assist in obtaining financing. Agent Weir similarly testified that he asked Mrs. Perry about her and her husband's income, but recalled asking no other questions pertaining to their financial capabilities.

Checker Blaser testified that Vi Costello only asked her about her and her husband's employment. She also said that agent Costello offered to help them obtain financing. Agent Costello testified that

> I was discussing price ranges, her husband's job, how much money she was going to devote to buying a home. She said that she had already been qualified by [John Mayfield] in our Heights office, and she told me she qualified for the upper 50's and low 60's.

Linda Blaser was not called on rebuttal to dispute this testimony. Therefore, the court finds that checker Blaser told agent Costello that she had already been qualified by agent Mayfield for homes in "the upper 50's and low 60's." Hence, agent Costello was justified in asking fewer questions than agent Weir asked black counterpart Perry.

On April 14, 1978 black checker Adrienne Drake met Hilltop agent Ann Gilmore while white checker Ruth Bartoo met agent Norman Hott.

Checker Drake testified that agent Gilmore asked her about her husband's income, her and her husband's employment, their debts and other obligations, and whether they had a house to sell. Mrs. Drake further testified that agent Gilmore said mortgage financing may be difficult to obtain, and she would help them obtain financing. Agent Gilmore testified that she asked Mrs. Drake where her husband worked, his income and their price range.

Mrs. Drake's white counterpart, Ruth Bartoo, testified that agent Hott asked her whether her present house was to be sold. There was also a discussion about down payments, but checker Bartoo's testimony gave no clear indication as to who initiated it.

In October 1978 black checker Juanita Newsom and white checker Diana Horrigan performed an audit of agents Mayfield and Leo Lee at the Hilltop office at Mayfield and Warrensville Roads in Cleveland Heights.

When checker Newsom first arrived at the office she was asked a few questions by both agent Mayfield and agent Leo Lee. Mrs. Newsom testified that at her initial visit she was asked about a down payment and whether they owned a home. She further testified that Mr. Lee said that a "legal"[65] would have to be run on her home. At her next visit, and still before seeing homes, Mr. Lee asked Mrs. Newsom about family debts and other obligations and her husband's employment. She further testified that Mr. Lee said he would assist them in obtaining financing. Agent Mayfield asked white checker Horrigan where her husband worked and whether they owned and planned to sell their home.

Also in October 1978, black checker M. Hortense Johnson met Hilltop agent Elaine Liff, and white auditor Susan Rust met agents Evelyn Gardner and Mary Hasselbach. Mrs. Johnson was asked for information on her husband's occupation and income, and the couple's debts and other obligations. Mrs. Johnson testified that agent Liff told her that she did not anticipate any problems

---

65. Mrs. Newsom testified that Mr. Lee described a "legal" as "a procedure used to check to make sure that your deed was in order or mortgage was in order."

with financing given the size of the down payment Mrs. Johnson indicated was available. Checker Johnson further testified that agent Liff offered to take her and her husband to the bank "to work out the financial procedures." Susan Rust testified that she was asked her husband's income and whether she was employed.

The evidence reveals that in the Drake-Bartoo, Newsom-Horrigan and Johnson-Rust 1978 audits, black checkers were asked more financial qualifying questions than white checkers.[66] The black checkers were asked more questions on income and occupation than white checkers. In the April 1978 Drake-Bartoo audit and the October 1978 Newsom-Horrigan audit, the black checker was asked about debts and other obligations. No white checkers were asked those questions. Nevertheless, there are several factors which weigh against finding disparate treatment.

First, it must be noted that there was lack of uniformity in the qualifying methods of the various agents who testified, and in each case the black checker audited a different agent than the white checker. Further, even where more questions were asked by one agent than the other in the same audit, the questions were those that all prospects should expert to encounter when buying a home. A real estate agent is not prohibited from asking race-neutral questions which he or she reasonably believes will help determine the prospect's financial ability to buy

---

66. In October 1978, black checker Constance Jones and white checker Roseanne Radgowski audited agent Evelyn Gardner. Checker Jones was asked about her husband's occupation and income while both Jones and Radgowski were asked about down payments. Agent Gardner testified that she never qualified buyers until both the husband and wife met with her. Because agent Gardner had not yet undertaken to qualify either checker, the court makes no finding as to her comparative qualification treatment.

a house. In summary, the court finds that Hilltop's financial qualification procedures as applied did not violate section 3604(a). Furthermore, Hilltop agents frequently offered to assist the black checkers with financing. This is clearly not discouragement based on race that is prohibited by section 3406(a).

D. Corporate Intent

Violations of section 3604(a) that occurred prior to 180 days before the filing of this action are not time barred if these incidents represented an unlawful practice which continued into the 180-day period. See *supra* pp. 30-31. To make such a determination, it is essential to find that Hilltop had a corporate intent to continue to "make unavailable or deny a dwelling to any person because of race. . . ."

Considered together, the eight 3604(a) violations previously found, each of which is imputed to defendant Hilltop, reflect such a corporate intent. The court now considers additional pieces of evidence which also bear on Hilltop's corporate intent.

D.(1.) Racial Steering Incident

First to be considered are four incidents of racial steering which this court imputes to Hilltop. These acts are not ones on which the plaintiffs may base their claims of racial steering because in each incident the checker or home seeker was neither steered to nor away from Cleveland Heights. However, taken together, these incidents of racial steering support a corporate intent to continue to engage in racial steering.

Chronologically, the first of these racial steering incidents is a statement made by agent John Mayfield to

white checker Hester Butterfield and her husband in May 1977. See *supra* note 26. Agent John Mayfield by his statement attempted to steer them away from a home on Scottsdale near the Cleveland - Shaker Heights border because that "end of Scottsdale is over integrated." In the next incident of racial steering, see *supra* p. 68 [A101], agent Leo Lee racially steered black checker Juanita Newsom away from homes which were available in less integrated areas of Beachwood and other communities which she requested, to the substantially integrated Concord-Beacon area of Beachwood. The third incident, see *supra* p. 107 [A130], is a conversation including Howard and Belita Gordon and Hilltop agent Francis, where agent Francis related a story to them about a black youth from a Lyndhurst family who was beaten in school. He also said that Mr. Gordon, a white, would have trouble representing his black children in the Lyndhurst - South Euclid schools. The court concluded that this statement racially steered the Gordons away from Lyndhurst.

Finally, in the Cuyahoga Plan's June 1978 "HUD-style" audit of the Euclid office of Hilltop,[67] white checker Judith Wayman audited agent Frances Fee on June 14, 1978. Black checker Lucille Davis audited agent Angela Stritof of the same office on the afternoon of June 16, 1978.

When Mrs. Wayman called the Euclid office, sales agent Fee agreed to an immediate appointment, and Mrs.

---

67. Before the first checker took the witness stand, the court ruled on defendants' objection to the evidence of this audit which involved a showing of homes in Euclid and Warrensville Heights and which "in no way impacted on Cleveland Heights." The evidence of this audit was only received as it might show Hilltop's "intent, plan, design, lack of accident" to violate the Fair Housing Act. This ruling was confirmed several times later during the trial. See, *e.g.*, Tx. 8139-40.

Wayman arrived at the office ten minutes later. Mrs. Wayman indicated to agent Fee that she wanted a three-bedroom house in the "low 60's" in Euclid or surrounding areas. That afternoon agent Fee showed her three homes, all located in the city of Euclid. One was on East 211th Street, the second on Champ, and the third on Upper Valley. Within a week after their first appointment, the sales agent called Mrs. Wayman and asked if she would like to see some more houses. Mrs. Wayman replied that they were having company that weekend, and she would not be able to look for a while.

Black checker Lucille Davis, and agent Angela Stritof agreed that their first contact was in a telephone call from Mrs. Davis to the Hilltop office. The court determines the call occurred on June 15.[68]

Over the phone, Mrs. Davis asked for a three-bedroom house between $55,000 and $65,000 in Euclid and surrounding areas. Mrs. Stritof testified and it is not disputed by Mrs. Davis that she did not tell Mrs. Stritof that she was black. Mrs. Stritof made appointments for the Upper Valley Road and the Chatworth Road homes, both in Euclid, and the Lawrence Road house in Clarkwood Estates, Warrensville Heights. On the afternoon of June 16, she showed the three homes to Mrs. Davis.

---

68. Lucille Davis, relying on her audit report, stated that she called the Euclid office on June 14 and made an appointment for June 16. Angela Stritof, Hilltop sales agent, agreed that she received a phone call but said the call was received on June 15 as recorded in her notes. She said that a "no show" on her telephone call memo meant that Mrs. Davis did not keep the appointment on the 15th. But Mrs. Stritof said that on the 16th she received another call at which time she set an appointment for that afternoon. Because it seems more likely that Mrs. Davis would have made an appointment for either the same day or the next day rather than two days later and because she gave no explanation for a two-day delay in the appointment to meet Mrs. Stritof, Mrs. Stritof's June 15 date for the telephone conversation is credited.

Plaintiffs do not claim that there is any disparate treatment of the two checker- with reference to the homes shown in Euclid. Indeed, as seen, one of those, the home on Upper Valley Road, was shown to both Mrs. Davis and Mrs. Wayman. Plaintiff's claim of disparate treatment involves the home on Lawrence Road in Warrensville Heights.

Undisputed evidence indicates and it is found that the brick ranch on Lawrence Road in Clarkwood Estates was first listed on June 15, 1978. Mrs. Stritof testified that she took the listing off the company telecopier on the morning of June 16.

Agent Stritof said that she took Mrs. Davis to Warrensville Heights because she, Mrs. Stritof, wanted to see the house, not because Mrs. Davis "had shown any interest in Warrensville Heights." Further, Mrs. Stritof said that she concluded that the Lawrence Road property was a good home to show Mrs. Davis

> because [she, Mrs. Stritof] thought it was a good buy at $56,900 when most of the homes in that area - all of Clarkwood Estates were selling for - asking upper $60's.

Mrs. Stritof stated that her first contact with Clarkwood Estates was a couple of weeks earlier when she showed and sold a brick ranch there to Juana Clark and her husband, a black couple:

> Two weeks previous I had sold a home there and I thought it was a lovely area, for one thing. I think I sold it for $61 or $62,500, or something right in that area, and here was a home in an identical area for $56,900. I'm a bargain hunter. I want to see it . . . I don't care who it had been, they would of gotten down to Warrensville Heights.

After viewing the two homes in Euclid, Mrs. Davis testified that she was driven "for a long time through the metropolitan park system." In talking to Mrs. Davis about the home she was going to be shown, Mrs. Stritof told her that it "was really a steal that was just listed that day." Mrs. Davis said that when they arrived she found the house was on a street that she was familiar with because she "had friends living on the street." Before they got to the house, Mrs. Stritof had told her that "it was a growing neighborhood and that it was 90 percent white, but everyone got along well." Mrs. Davis said it was a very nice house and that Mrs. Stritof "gassed over it - 'oh, look at this. This is so beautiful.'" She observed that "it was different than the way she had talked to [her] about the other houses."

According to Mrs. Davis, on their way back to Euclid, Mrs. Stritof told Mrs. Davis that she wanted her "to put a bid in right away." She said that "she wasn't going to let anybody else know about it so that I could grab it the next day if I could bring my husband to see it." Mrs. Davis further quoted her as saying that the Lawrence Road house would "sell for $89,900 if it were in Euclid, and she said people would be fighting for it." In her audit report, Mrs. Davis noted that "90 percent of the people were, mostly children, that I saw were black." Mrs. Davis' quotations of Mrs. Stritof's remarks are credited. Mrs. Stritof's denials of these attributed remarks and her statement that she had not seen any blacks in the area either then or when she had shown a home to Juana Clark on Springdale Road are not accepted.[69]

Mrs. Stritof learned that Mrs. Davis was black when they met at the Hilltop office in Euclid. It is found that

---

69. According to the 1980 census, Warrensville Heights had a black population of 75 percent.

she knew that the Clarkwood Estates area was predominantly black. Mrs. Stritof drove Mrs. Davis 16 miles to see a home in an area Mrs. Davis had not asked to visit. She used the pretext that she, Mrs. Stritof, wanted to see the property. Under all these circumstances, it is concluded that Mrs. Stritof's showing of the Lawrence Road property to Mrs. Davis was an act of racial steering.

Plaintiffs claim that Mrs. Stritof's sale of the Springdale property in Warrensville Heights' Clarkwood Estates to Juana Clark and her husband is another racial steering incident. Over the objection of the defendants, the court permitted Mrs. Clark to be called by the plaintiffs to rebut Mrs. Stritof's statement that it was Mrs. Clark who had led Mrs. Stritof to the Clarkwood Estates area of Warrensville Heights. Plaintiffs made no motion at trial for a reopening of their evidence to introduce the testimony of Mrs. Clark as part of their evidence in chief. Hence, it will be considered solely as rebuttal evidence to impeach the testimony of Mrs. Stritof.

Mrs. Stritof testified that Juana Clark had called the Euclid office and made an appointment with her. She stated that at that time, Mrs. Clark told her that she wanted "a brick, either like a split or a ranch, or something very modern." Asked if she had sold a home in Warrensville Heights to a black, Mrs. Stritof answered "yes." Mrs. Stritof further testified, "she actually led me there" and that "she wanted that area." Mrs. Clark testified that:

> I told her that if I deposited "x" amount, could I get a house within $50,000 or $60,000; that it had to be a brick ranch. And we described, you know, three-bedrooms, finished rec room, attached garage, things to that effect.

However, Mrs. Clark testified that she did not at any time tell Mrs. Stritof the areas in which she was looking at properties and that her words were:

> It didn't matter where in Cleveland, as long as it was a brick ranch and something that we wanted. The specific location was not mentioned.

She said they went to Bedford Heights and to Warrensville Heights but that she did not ask to see either place.

With the testimony of Mrs. Stritof and Mrs. Clark in conflict as to which one initiated the visit to Clarkwood Estates in Warrensville Heights, the statement of Mrs. Clark is credited on several grounds. First, when asked if Mrs. Stritof asked her where she was interested in looking, she answered, "No, because I was only five years in Cleveland, you know."[70] Because of her short stay in Cleveland, it is plausible that given the size of the metropolitan area, she would not have known enough about the area to ask specifically about either Bedford Heights or Warrensville Heights.

Second, Mrs. Stritof said that it was Mrs. Clark who mentioned the area of Bedford or Warrensville Heights and that she, Mrs. Stritof, "had never been there before." Yet, Mrs. Stritof showed her knowledge of the housing in those cities when she said "what [Mrs. Clark] wanted was a brick, preferably a ranch. You have to go where they are." Third, there was implicit conflict in her testi-

---

70. She testified that she came to Cleveland in 1973. The showing of homes in Bedford Heights and Warrensville Heights was in late May or early June 1978.

Mrs. Clark brought out her lack of familiarity with the Clarkwood Estates area in this testimony:

> I cannot say I drove down Lawrence. At the time I did not know the area We drove around Clarkwood to get to Springdale.

mony about Euclid. Asked if she showed Juana Clark homes in Euclid, Mrs. Stritof answered, "I'm sure I did. I just don't recall." Later, when asked if there were ranches in Euclid, she answered, "Not in the price range she wanted."

Finally, Mrs. Stritof's testimony and her demeanor revealed that she made statements to protect her self-interest as a Hilltop agent. Mrs. Clark, subpoened as a witness and showing a reluctance to testify, had no interest in the law suit and lacked any motive to mistate her conversations with Mrs. Stritof.

Weighing the testimony of Mrs. Stritof and Mrs. Clark, it is concluded that it was Mrs. Stritof who led Mrs. Clark to Bedford Heights and Clarkwood Estates. Since Juana Clark's testimony throughout her appearance as a witness was treated solely as rebuttal testimony, it may not be used as proof of another steering incident. Nevertheless, it further impeaches the testimony of Mrs. Stritof and reinforces the court's findings with reference to her steering Lucille Davis to Warrensville Heights.

D. (2) Stephanie Nicholes

Stephanie Nicholes, a Hilltop agent in the Heights office during four months in 1974, was called as a witness to describe her transactions with Heights office manager Dominic Sabatino and Hilltop agent Julian Vanni. Defendants objected to her testimony on the ground that her experience with Hilltop was "far removed in time from the claims" in this action. Plaintiffs stated that they offered the testimony to show "admissions made by Hilltop officers in terms of racial conduct of the Heights office." Overruling the objection, this court in part stated that "intent can be shown for any period of time."

Based on the testimony of Stephanie Nicholes formerly Stephanie Muenger), the contradictory testimony of Julian Vanni and Dominic Sabatino, and the record, the court makes the following findings.

Julian Vanni, agent in the Lyndhurst office of Hilltop Realty, was the listing agent of a home at East 152 Street and Lake Shore Boulevard. An attorney was handling an estate's sale of the property. Hilltop agent Nicholes called Hilltop agent Vanni to report that she had an offer on the house and that she wanted to make an appointment to present the offer. According to agent Nicholes, Mr. Vanni's first question was, "Are the buyers black or white?" She responded, "You're not allowed to ask me that." She stated that Mr. Vanni also told her that the people were not going to sell to blacks and that "if my buyers were blacks, we may as well forget it." Her buyers were white, and the house was sold to them. Concerning this conversation, Ms. Nicholes stated that she "asked Dominic [Sabatino] if Julian had been allowed to ask me that, and he said no" and that "he would take care of it."

Mr. Vanni testified that he recalls a phone conversation in which Ms. Nicholes told him that she had an offer on the property. He said he explained to her that an attorney represented 16 or 17 heirs. He told her that if she would bring a written offer to his office, he would present the offer to the attorney, "and after the attorney either said yes or no, [he] would get back to her." Mr. Vanni denied that in the phone conversation with Ms. Nicholes he asked Ms. Nicholes "what the race of the buyers were."

When Mr. Sabatino was asked if he had discussed with Stephanie Nicholes her conversation with Julian

Vanni while she was working at the Cleveland Heights office in 1974, he answered "No sir." He further denied that Ms. Nicholes had told him that "Mr. Vanni had asked the race of buyers" whom Stephanie Nicholes was representing in making an offer on a home. The court does not credit Mr. Sabatino's denial and instead finds that Ms. Nicholes told Mr. Sabatino about Mr. Vanni's statement.

Taking into account the unswerving nature of Stephanie Nicholes' assertions,[71] her follow-up conversation with Mr. Sabatino, Mr. Vanni's and Mr. Sabatino's unconvincing denial of the conversations attributed to them, and the lack of proof of any reasons that might have prompted Ms. Nicholes to falsify the several conversations, it is found and determined that Julian Vanni made the statement attributed to him by Ms. Nicholes and that Dominic Sabatino failed to take any action.

Defendant Hilltop presented considerable evidence to show that it instructs its agents in fair housing law and urges them to act accordingly. Yet despite Hilltop's professed efforts to train agents to protect clients against any denials of housing opportunities based on race, Mr. Sabatino as the manager of Hilltop's Heights office failed to impose any type of sanction on Mr. Vanni for his statement to Stephanie Nicholes. Manager Sabatino's failure offers proof of corporate intent to not obey the Fair Housing Act.

Stephanie Nicholes stated that at a later time she was driving with Mr. Sabatino to make an offer on a home

---

71. While the occurrences about which she testified occurred five years before the filing of the lawsuit, she believed that in 1976, after she first moved to Kirkwood Road in Cleveland Heights, she had been called by phone about "steering," apparently in connection with the HCC new homeowner questionnaire. She said "at that time" she knows that she "told someone" that she knew "about some practices."

on Sheffield Road in South Euclid. Mr. Sabatino told her that if she showed a house in South Euclid to a black, her house would be bombed. Mr. Sabatino recalled a listing on Sheffield that was his listing but denied that she ever accompanied him to that home. Asked if he made the statement attributed to him, he answered "No, sir. I never would say that to her or anybody else." The court finds that the statement was made.

Mr. Sabatino's own statement, which may have influenced agent Nicholes to not make properties in South Euclid available to prospective black home buyers, appears to show a corporate intent to not show available homes to black prospective home owners. However, Mr. Aveni's undisputed testimony contradicts such a conclusion. In late 1974, just a few months after Mr. Sabatino made the statement to Stephanie Nicholes, Hilltop was involved in the sale of a home in South Euclid which was vandalized after it became known in the neighborhood that Hilltop had sold the home to a black couple. Mr. Aveni then took steps to preserve the sale to the black couple by contacting the FBI and the South Euclid police. He also arranged for and held a meeting with owners in the area "to explain to them the fair housing laws" and to assure them that "blacks were able to buy anywhere." He tried "to allay fears" that a black's entry into the area would cause "price reductions," noting that the black buyer was "a well-qualified individual." Finally, Mr. Aveni met with the black buyers and reassured them when they were getting ready "to back out of the transaction."

Hilltop's sale of a house to a black couple in South Euclid and Hilltop and Mr. Aveni's affirmative acts to preserve the sale after the home was vandalized shows that in this instance in late 1974, Hilltop acted to protect the Fair Housing Act rights of this client.

D.(3) Mayfield's Activities

It is important to ascertain the extent of defendant Hilltop's knowledge of the activities of agent John Mayfield and what action, if any, it took concerning those activities.[72] The Cleveland Heights Housing Board met with Hilltop agent John Mayfield and his Heights office manager, Grace DiDonato, on January 19, 1977. Commissioner of Real Estate Programs Barbara Roderick and Law Director Donald Barclay were also present. Barbara Roderick testified that the housing board members presented their concerns about an audit of Mr. Mayfield in connection with 1688 Maple Road, Cleveland Heights. She reviewed some of the racial statements which the checkers attributed to Mr. Mayfield in their audit reports. She stated that the Board gave Mr. Mayfield an opportunity to respond to the Board's concerns over "racial comments made to the white checker." It was her recollection that Mr. Mayfield did not deny the statements.

At trial after a series of the reported racial remarks had been recited to Mr. Mayfield, he was asked whether he recalled them being discussed at the January 1977 meeting. He answered "no." To the best of his recollection, Mr. Mayfield recounted that the Board

---

72. Agent Mayfield was dismissed as an individual defendant at the end of plaintiff's evidence pursuant to this court's March 17, 1983 memorandum and order. The court recognized that "considerable evidence in the record . . . involved Mr. Mayfield, [but] only the full audit of him by white auditor Diana Horrigan occurred within the time limitation of Title VIII (42 U.S.C. §3612), *i.e.*, 180 days before plaintiffs filed their complaint on March 7, 1979." Since this incident occurring within the 180 days was found not to "constitute a violation of section 3604(a) or any other provision of the Fair Housing Act," the action against him was dismissed. However, this does not affect Hilltop's liability for his violations which were committed prior to the 180 days.

> had some complaints about racial remarks and other complaints, and [they] wouldn't go into detail to say what they were. They were all confidential.

Manager DiDonato remembered that at the meeting it was stated that John Mayfield had been audited. She also testified that

> John, of course, was trying to explain his position based on what they were saying about him and he just kept asking them and asking them questions about who's making these statements and where were they made, and they just wouldn't tell him. They just kept saying that the information was confidential.

When specific remarks of Mr. Mayfield, as reported by the checkers, were separately read to Mrs. DiDonato, she said she did not remember "specifically what was said regarding the audit at all."

Mr. John J. Boyle, Housing Board member, stated that at the January 19 meeting, as it related to Mr. Mayfield, the Board reviewed "the audit and the New Homeowner complaints with Mr. Mayfield and with Ms. DiDonato." He said that the Board discussed with them "the unsolicited racial comments." At several points in his testimony, Mr. Boyle stated that Mr. Mayfield "said nothing." It is concluded that those comments and probably other racial comments attributed to Mr. Mayfield by white checker Pap and black checker Tufts, as set forth in the discussion of the August 1976 audit of Mr. Mayfield, see *supra* pp. 33-39 [A74-8], were divulged to Mr. Mayfield and manager DiDonato. While the names of the checkers were not disclosed to Mr. Mayfield and Mrs. DiDonato, the Board members had met with the checkers at some previous time to verify their reports of Mr. May-

field's racial comments. Corroboration that the Board brought the checker reports to his attention is contained in a letter of January 31, 1977, which Mr. John Mayfield received at Hilltop's Heights office from City Manager Robert A. Edwards. In part, the letter stated:

> Members of the Heights Housing Board have written to me of their meeting with you in relation to several complaints about your real estate practices, which they discussed with you on January 19, 1977.
>
> • • • • •
>
> The Board found that the audit specifically indicated that black and white checkers did not receive equal treatment, that racial remarks were frequently introduced by you, and that you failed to promote Cleveland Heights in a positive manner.

The letter further informed him that the Board recommended and Mr. Edwards concurred that Mr. Mayfield was to be placed on probation as a "Preferred Agent" until they were satisfied that he was meeting the "Preferred Agent Agreement."

Manager DiDonato called Mr. Aveni after the meeting on January 19 and told him what had happened. While her recollection of what she told Mr. Aveni is very general, it is concluded that she undoubtedly reported to him the racial remarks attributed to Mr. Mayfield at the January 19 meeting of the Housing Board. With regard to the January 31 letter to Mr. Mayfield, Mr. Aveni states that he was informed of the letter a few weeks after Mr. Mayfield received it.

Barbara Roderick and City Manager Edwards met with Mr Aveni and Dominic Sabatino, who was then a vice president of Hilltop Realty. She stated that she expressed

her concerns "about Mr. Mayfield's—about the audit and our request for the sales information." In the January 31 letter, City Manager Edwards had requested that Mr. Mayfield produce a written record of his 1976 sales inside and outside of Cleveland Heights, by address and race of buyer. She recalled that Mr. Aveni "again stated that they felt that that would be a violation of confidentiality."[73] Mrs. Roderick further stated that Mr. Aveni "indicated that Mr. Mayfield was a problem agent."

When he was called by the plaintiffs as an adverse witness, Mr. Aveni recalled the meeting with Barbara Roderick, City Manager Edwards and Dominic Sabatino. However, he said that the findings of the Housing Board were not discussed at the meeting and that "the only thing Mr. Edwards and Mrs. Roderick addressed was the fact the Board had asked for this customer list." Later, during his direct testimony as part of Hilltop's case, he denied that "any audits of Mr. Mayfield specifically [were] discussed at this meeting that [he] attended." On the same point, he contradicted himself during cross-examination.[74] Showing lack of recall on other points,

---

73. By letter of February 23, 1977 Mr. Aveni informed City Manager Edwards that it was "the policy of Hilltop Realty, Inc., that our client list is confidential and that to give you the addresses of the properties that John Mayfield has sold, would be a violation of a client confidentiality." Because Mr. Mayfield never agreed to disclose names of clients in sales outside Cleveland Heights, the Housing Board and the Cleveland Heights city manager refused at a Board meeting in October 1977 to grant Mr. Mayfield's application for reinstatement to the preferred agent program.

74. Following is the colloquy:

Q: So there was no mention made to you that Mr. Mayfield had been before the housing board primarily for his use of racial remarks in showing property to individuals? (Objection overruled.)

(Continued on following page)

Mr. Aveni testified that he did not recall that Mrs. DiDonato had told him "about the racial remarks [Mr. Mayfield] was supposed to have made in that audit," and he further denied that he indicated to Mr. Edwards that John Mayfield as an agent was a problem to him.

Considering the foregoing evidence, other relevant evidence in the record, and all reasonable inferences therefrom, it is found and determined that Mr. Aveni was told by Mrs. DiDonato about the racial remarks attributed to Mr. Mayfield in the audit that was discussed at the housing board meeting. Further, Mr. Aveni learned first hand in his meeting with Mr. Edwards and Mrs. Roderick about the audit of Mr. Mayfield and the racial remarks attributed to Mr. Mayfield by the checkers who conducted that audit.

When he testified as an adverse witness, Mr. Aveni was not sure whether or not he had talked with John Mayfield after the receipt of the January 31 letter. But later, during his direct examination in Hilltop's case, Mr. Aveni stated that "he talked with Mr. Mayfield concerning his supplying the records and he did not want to supply those records." It is believed that Mr. Aveni did talk with Mr. Mayfield. It is further believed that although he knew that racial remarks were attributed to Mr. May-

---

Footnote continued—

A: I'm not sure.

* * * * *

Q: Did you know that Mr. Mayfield had been audited in 1976 at the time of your meeting?

A: With Mr. Edwards?

Q: Yes.

A: Yes. They informed me.

Q: They told you he had been audited; is that correct?

A: Yes.

field, Mr. Aveni did not take up this matter with Mr. Mayfield or in any way reprimand him. Even if Mr. Mayfield denied making the racial remarks, Mr. Aveni should have made it clear that such remarks would not be tolerated from a Hilltop agent.

Mr. Mayfield continued to be a Hilltop agent until early 1979. When asked, "In all the time that you worked for Hilltop, were you ever told by any management person, including your office manager, your sales manager, any Hilltop administrative personnel, that you had to stop making racial remarks to prospective purchasers," he answered "no." Even though Hilltop trained its agents to comply with the law, in the face of full notice of Mr. Mayfield's history of making racial remarks to prospective customers, brought to the attention of Hilltop on different occasions, Hilltop management failed to even discuss the matter with him, let alone give him an appropriate reprimand or termination warning.

As in *Marr v. Rife*, 503 F.2d at 742, Hilltop and president and chief operating officer Aveni had "the power to control the acts" of Hilltop's sales agents. Therefore, the failure of Hilltop and Mr. Aveni, as chief executive officer, to take action against Mr. Mayfield is direct evidence of a corporate intent to not obey the Fair Housing Act.

D.(4) Mary Hudson

Further bearing on corporate intent are the reactions of Hilltop Realty to an experience of its black sales agent Mary Hudson.

In April or May 1978, agent Hudson made an appointment to take her client, Mr. Riley, a black male, to an open house on Cato Street in Maple Heights. When they

arrived at the Cato home, she was met at the door by a white person whom she believed to be the listing agent. The agent told her to wait outside, entered the house and later returned. He told Mrs. Hudson that the owner did not want them to come into the house. Even though Mrs. Hudson told the listing agent that she had an appointment to show the house to her client, the white male would not allow them to enter.

Mrs. Hudson informed her manager, Grace DiDonato, Heights office manager, of the Cato Street incident. Mrs. Hudson stated that she "found out" that Mr. Riley was not interested in making any problems, that "he wanted to leave it alone." She remembers that "within the next day" Mrs. DiDonato told her she was "trying to reach . . . the broker or the manager of the office." She believes on one other occasion Mrs. DiDonato said something to her about the incident, but she could not specifically remember what it was.

Subsequently, Mrs. Hudson attempted to show a home to Mr. Riley on Maple Heights Boulevard in Maple Heights. When she set up the appointment to see the house she was told to pick up the key from another real estate company (it was not a Hilltop listing). At their office she was told they did not have a key and that another agent must have forgotten to bring it back. Mrs. Hudson left the office, called her manager, and was told to wait for a return call. Eight or ten minutes later, Mrs. DiDonato called her and told her to go back to the listing office, "there is a key there." When she returned to the office, she was given a key, but by the time she arrived at the house where Mr. Riley was waiting, he had gone. While office manager DiDonato sought to protect the right of Mrs. Hudson's client to be shown the home, nonetheless, Mr. Riley's fair housing rights were impaired.

Because of the interference with the Fair Housing Act rights of a Hilltop client to be shown available properties on two separate occasions, and because Hilltop agent Hudson had promptly brought these experiences to the attention of her manager Mr. DiDonato, and given Hilltop's professed policy of compliance with the Fair Housing Act, it is reasonable to presume and the court finds that these incidents were reported by office manager DiDonato to chief executive officer Aveni or others in management.[75]

The failure of management to follow up on the Cato incident involving agent Hudson and to report back to her what it had found and done about it, reflected a corporate intent to not protect the Fair Housing Act rights of a client of Hilltop agent Hudson.

E. Defendants' Homeowner Witnesses

Among the witnesses called by the defendants were ..... persons who purchased homes in Cleveland Heights through Hilltop Realty. Six were black, one was Hispanic, and fifteen were white. Twelve of the 22 homeowner witnesses dealt with Hilltop agents John Mayfield,[76] Steven

---

75. The likelihood of these experiences being thus reported is increased by a further incident experienced by Hilltop agent Hudson thereafter and reported by her to manager DiDonato. Agent Hudson showed a black couple a home on South Perkins in Bedford Heights. When they walked to the home from their automobile, neighbors yelled racial slurs at them.

76. To attack the merits of plaintiffs' evidence showing Mr. Mayfield's conduct violative of section 3604(a), defendants introduced evidence relating to John Mayfield's sales in Cleveland Heights from 1976 to 1979. Defendants argue that this evidence demonstrates that Mr. Mayfield "had no practice of steering, of selling [to] anybody of any race in any particular area." Although this evidence shows that Mr. Mayfield sold homes to both blacks and whites in many different census tracts within Cleveland Heights, this does not prove that Mr. Mayfield had no practice of steering. The evidence does not show what areas

(Continued on following page)

Paul Francis, Evelyn Gardner, Delores Russo, and Leo Lee, the conduct of whom was the subject of testimony by plaintiffs' witnesses. The remaining ten homeowner witnesses called by the defendants dealt with ten other Hilltop-sales agents.

Defendants argue that the "testimony of the actual home buyers demonstrates that Hilltop engaged in no pattern practice of violating the Fair Housing Act." The court is treating plaintiffs' claims of racial steering not as a pattern or practice claim, but rather as a claim that the incidents represented a continuing violation of section 3604(a) which continued into the 180-day limitations period. Therefore, the experiences of 22 home buyers called as witnesses will be considered for possible rebuttal of this latter claim. First, the court will consider the experiences of 12 home buyers shown homes by Hilltop agents whose conduct is challenged in plaintiffs' evidence.

Ruth M. Raitz bought a home at 4038 Monticello Blvd., Cleveland Heights through Hilltop agent Delores Russo. In addition to the home's physical requirements and amenities which she requested, she said "[she] would like the home sort of in Lyndhurst, Richmond Heights or South Euclid just from driving up through that area." In August 1978, on three different days covering several weeks' time, Mrs. Russo showed her some 22 homes in Mayfield Heights, South Euclid, and Lyndhurst. After her third visit, she "was getting disgusted." Mrs. Russo then told her "some things about Cleveland Heights, the school district, the price range." She suggested Cleveland Heights to Ms.

Footnote continued—

these 34 home buyers asked to see. In the absence of the circumstances surrounding the selection of the location of each of the homes Mr. Mayfield sold, no inference may be drawn from the locations where Mr. Mayfield sold homes.

Raitz and picked out two homes in Cleveland Heights, one of which Ms. Raitz purchased.

Ms. Raitz said that Mrs. Russo did not say anything that discouraged her about Cleveland Heights. Indeed, it was Mrs. Russo who suggested Cleveland Heights and said that Cleveland Heights might have property that Ms. Raitz "would be able to better afford . . . and might have more of the things [she] wanted." This act of not steering a white home buyer away from Cleveland Heights is relevant in determining whether Hilltop Realty has rebutted plaintiffs' proof of a continuing violation of section 3604(a).

Black homeowner Wade N. Young told Hilltop agent Norman Hott that he was interested in "Cleveland Heights and University Heights" and he bought property on Meadowbrook Boulevard in University Heights. However, agent Hott showed the Youngs two houses that were in South Euclid or Lyndhurst. One was "a couple houses off Mayfield," east of Richmond in Lyndhurst. The Youngs stated that "the one off of Mayfield, we had considered buying." Mr. Hott's showing of two homes outside of Cleveland Heights, one of which was in Lyndhurst, is not an act of steering a black home buyer into Cleveland Heights.[77] It is immaterial that the Youngs eventually decided to buy in University Heights. Agent Hott's act is relevant in determining whether Hilltop has

---

77. Mr. Joseph Sterling, a black home buyer, wanted a split-level home in Cleveland Heights. Eventually, agent John Mayfield found such a house for Mr. Sterling in Cleveland Heights, which Mr. Sterling purchased. Mr. Mayfield suggested a split-level home in Lyndhurst, but Mr. Sterling told him he "didn't want to go there." Since no homes were shown to Mr. Sterling in Lyndhurst, Sterling's experience is not the same as that of Mr. Wade Young, who was shown homes in Lyndhurst, although he had wanted Cleveland Heights or University Heights.

rebutted plaintiffs' proof of a continuing section 3604(a) violation.

The experiences of the following homeowners are determined not to be relevant to rebut plaintiffs' claim because each expressly or impliedly asked for the area in which she or he purchased. In dealing with agent Leo Lee, Mr. Gerald Artl specifically "asked for Cleveland Heights" as well as "South Euclid or University Heights or Euclid." The showing of homes to Mr. and Mrs. Artl in Cleveland Heights and outside of Cleveland Heights complied with their area requests and were not done at the suggestion of agent Lee.

Black homeowner Harry Mays, serviced by agent John Mayfield, told him that he "wanted to get a home in Cleveland Heights." He did not request any other area. Hubert Von Sehrwald, a white homeowner, met Mr. Mayfield at an open house of a home at 3399 DeSota in Cleveland Heights; he told Mr. Mayfield he was interested in buying the house if it could be financed. A loan was arranged, and he bought the house.

White homeowner Dorothy Landis bought a home in Cleveland Heights through agent Delores Russo. The Landises moved because her employer moved its plant to Mayfield Village from Parma, where she and her husband had been living. Mr. Landis worked at the Veterans Administration. In dealing with agent Russo, Mrs. Landis stated that she "wanted between Mayfield and Monticello or north, in that relative area." Monticello provided access to the VA Hospital in University Circle and also to her own place of employment. Because she wanted a house with "character," Mrs. Landis knew that they would be looking for a house "in either University Heights, Shaker

Heights or Cleveland Heights, and Cleveland Heights was closer [to] what [they] wanted in price."

Three white homeowners who testified as defendants' witnesses used the services of agent Steven Paul Francis. Each bought a home in Cleveland Heights. Douglas Peco bought a home at 922 Roanoke Road, which runs east from Noble Road. He had been driving from a residence on Cleveland's southeast side across the city to his place of employment at East 152 Street and Noble Road in East Cleveland. Mr. Peco told agent Francis that he wanted to "live in a, at least a five-to eight-mile radius from [his] . . . job." Mr. Francis showed him homes in Cleveland Heights, Lyndhurst, Mayfield and South Euclid. Once he saw the home on Roanoke Road, within that radius, he decided to buy it.

White homeowner Gregory Hall purchased a home at 3337 Silsby Road in Cleveland Heights. Among the "requirements . . . specified to Mr. Francis," Mr. Hall told him that he "wanted to move into Cleveland Heights."[78]

Michael F. Hoffer, a white homeowner, bought a home at 3699 Berkeley Road in Cleveland Heights, after being shown a number of homes by Mr. Francis. The showings began during Mr. Francis' relationship with Elco Realty and continued when he moved to Hilltop Realty. Mr. Hoffer told Mr. Francis that he would like to find something "in the Heights," which he defined as "Shaker, University Heights, Cleveland Heights." Mr. Hoffer

---

78. Not only did Mr. Francis show Mr. Hall homes that were "all over Cleveland Heights", belying racial steering, but when Mrs. Hall asked whether the neighborhood was "racially integrated", Mr. Francis recommended that the Halls meet their neighbors to find what the neighborhood was like. He arranged for the Hall's to meet their immediate neighbors, a biracial couple.

also told Mr. Francis that he was interested in living in an "integrated, stable neighborhood."[79]

Ellis B. Mascareno, a Hispanic homeowner, asked to be shown homes in South Euclid and Lyndhurst. He was shown both areas and bought a home in 1977 on Anderson Road in South Euclid through agent Evelyn Gardner.[80]

Attention is now directed to the ten Hilltop agents whose conduct was not the subject of testimony offered by the plaintiffs. These agents sold homes to the remaining ten homeowner witnesses called by the defendants.

Plaintiffs challenge the testimony of these ten homeowners because they

> bought homes from Hilltop agents whose conduct was not at issue at trial and, if such conduct were at issue, would not have been probative insofar as unfair housing practices are concerned from 1976 to 1979.

Counsel for the defendants disagree, urging that it was "relevant to have before the court the actions and the patterns of other agents, so that the Court can have a complete picture of how Hilltop has operated during the relevant period."

---

79. Mr. Hoffer asked Mr. Francis about the racial stability of the Berkeley Road neighborhood. In doing so, Mr. Hoffer was seeking information that bore on his decision to buy a home on that street. Mr. Francis' response, as quoted by Mr. Hoffer, described the area as "a stable, integrated area." The answer, to a reasonable home buyer, is relevant information in that it assists a prospective home buyer in making a housing choice. While race was mentioned, the reference was factual and without any intent to discourage purchase of the home. It is not a violation of section 3604(a).

80. Ella Mae Harris, a black homeowner, bought a home in South Euclid through agent Gardner after moving to the Cleveland area in 1981. Because this transaction was subsequent to the filing of the lawsuit, it is not deemed relevant.

Eight of these ten "other agents" dealt with homeowners who asked to look at homes in Cleveland Heights.[81] Therefore, the experiences of these eight homeowners are deemed not to be relevant to rebut plaintiffs' claim. However, the experiences of the remaining two homeowners are found to be relevant.

Donald Robinson is a Beachwood, Ohio police officer. He and his wife, white homeowners, purchased a home at 3830 Parkdale Road, Cleveland Heights in the summer of 1978. Prior to that, they rented a home in Richmond Heights. In purchasing the Cleveland Heights home, they used the services of Gene and Claire Fallon, agents in the Beachwood office of Hilltop.

The Fallons showed them homes in South Euclid, Lyndhurst, Cleveland Heights and University Heights. Asked how it was that he came to look at houses in Cleveland Heights, Mr. Robinson answered that he believed, "[i]t was suggested by the realtor," Claire Fallon. When this suggestion was made Mr. Robinson said that he "told her [he] really didn't care to, [he] wished to look in the Lyndhurst-South Euclid area." Nevertheless, the Fallons still showed them two homes in Cleveland Heights, as well as homes elsewhere.

Mr. Robinson asked Claire Fallon about the effect on property values of the racial makeup of the area in which he was buying. She responded that "she can't answer because she couldn't give me the answer." In this situation, it is material that agent Claire Fallon re-

---

81. These eight homeowners either asked for property in Cleveland Heights or laid down requirements as prospective buyers that necessarily led to the showing of homes in Cleveland Heights. The showing of these homes in Cleveland Heights did not involve independent acts carried out at the suggestion or recommendation of the Hilltop sales agent.

frained from giving any answer that might discourage the Robinsons from buying in Cleveland Heights and suggested that the Robinsons look at property in Cleveland Heights. Since Mr. Robinson told her he did not care to do that, it is evident and it is found that it was Claire Fallon's independent suggestion that caused the Robinsons to buy one of the two homes they were shown in Cleveland Heights. It is concluded that in suggesting to prospective home buyers that they look at Cleveland Heights properties, in showing Cleveland Heights homes, one of which was purchased, and in refraining from saying anything relating to the neighborhood and its racial makeup, Claire Fallon did not racially steer the Robinsons.

George J. Markon and his wife purchased a home at 3943 Orchard Road in Cleveland Heights in 1977. They had inquired about a home in Mayfield Heights advertised by Hilltop Realty. When introduced to agent Charleigh Seith, they told him they were "looking for a house primarily in the Mayfield Heights area," because of the location of her employment. After seeing three or four homes in Mayfield Heights, they expressed disappointment at what was "offer[ed], and for the price." Mr. Seith then recommended that they "take a look at the houses in Cleveland Heights." He stated:

> [T]he houses in Cleveland Heights would be a much better value than those that we saw in Mayfield Heights, and . . . would offer us a lot more than we were presently seeing.

They eventually decided to buy the house on Orchard, which they later learned "was an integrated street."

In recommending that the Markons look at Cleveland Heights properties, and in showing them homes in Cleve-

land Heights, including a home on an integrated street, Hilltop agent Seith did not racially steer the Markons.

Thus, only the experiences of four of the 22 homeowners called as defendants' witnesses are relevant to rebut plaintiffs' claim.

F. Section 3604(a): Summary and Conclusions

In connection with the cross-examination of their expert Dr. John Kain, plaintiffs stated on the record:

> [T]he Heights Community Congress and the City of Cleveland Heights conducted a total of 22 audits on Hilltop. . . . Of the 22 audits the Plaintiffs have introduced evidence of 12 audits. Eleven of the twelve audits introduced in evidence were conducted by the Heights Community Congress and the City of Cleveland Heights. The twelfth audit (Wayman-Davis) was conducted by the Cuyahoga Plan.

These 11 audits conducted by the Heights Community Congress and the City of Cleveland Heights, with two checkers per audit, constitute 22 individual contacts. It has been determined in parts B.(1) through (11) that in six of the 22 individual contacts (also referred to as incidents), Hilltop agents engaged in violations of section 3604(a). It was determined that agent Mayfield racially steered black checkers Tufts and McGee and white checkers Pap and Blaser. It was further determined that agent Mayfield attempted to racially steer white checker Butterfield, but this was not steering away from Cleveland Heights.

It was determined that agent Weir racially steered black checker Perry. It was also determined that although agent Lee racially steered black checker Newsom, she was not steered into Cleveland Heights. It was further

determined that agent Liff violated section 3604(a) by failing to show available homes to black checker Johnson on the basis of race.

There were three incidents of alleged racial steering of actual homebuyers. It has been determined that agents Russo and Abbott made statements which constituted racial steering in servicing, respectively, prospective home buyers Emoff and Mr. and Mrs. Calabrese. Additionally, Mr. and Mrs. Gordon were racially steered by agent Francis, although that steering was not into or away from Cleveland Heights.

In sum, of the 25 incidents claimed by the plaintiffs to violate section 3604(a) through acts or statements, it has been found and determined that five agents of Hilltop engaged in eight violations of section 3604(a) that involved Cleveland Heights.[82] Each of the acts or state-

---

82. Dr. Kain testified that Hilltop's differences in showings based on race accelerated resegregation in Cleveland Heights. He based his opinion on the number of black checkers shown homes in Cleveland Heights as compared to the number of white checkers shown homes there. The numbers were given in a hypothetical question posed to him on direct examination. The facts in the hypothetical summarize the showings in seven of the twelve audits introduced into evidence by the plaintiffs. Plaintiffs argue that it is only these seven audits that deal with differences in showing. Showings which occurred in the other five audits introduced into evidence and showings which occurred in the remaining eleven Hilltop audits not introduced into evidence at this trial were not incorporated into the hypothetical.

On cross-examination Dr. Kain was asked:

> Q. [Y]ou assumed that the other audits not included in the seven pairs that Mr. Friedman referred to, the show ings would be equal on both sides; is that correct?
>
> A. That is correct, that is correct.
>
> Q. And if, in fact, the showings were not in the same ratio as indicated on the board, that would affect your opinion?
>
> A. That is correct. That is correct.

(Continued on following page)

ments of these agents was made within the agent's course and scope of employment with Hilltop Realty, Inc. and, therefore, are imputed to Hilltop.

The eight incidents of making a dwelling unavailable because of race, committed by Hilltop agents, were not isolated incidents. They occurred in the successive years of 1976, 1977 and 1978 and demonstrate, as found in II.D., a corporate intent to continue to violate section 3604(a). Moreover, that corporate intent is corroborated by other incidents in the years 1974, 1977, 1978 and 1979, as found in II.D., which either show Hilltop did not intend to comply with the Fair Housing Act or that it did not uniformly protect the Fair Housing Act rights of Hilltop's clients. In part, that corporate intent involves the corporation's 1977 knowledge of racial statements which John Mayfield made in 1976 and for which he was neither reprimanded nor warned by management. That corporate knowledge paralleled in time John Mayfield's four acts of racial steering during the years of 1976, 1977 and 1978.

The findings of these eight violations are determined to constitute *prima facie* evidence of Hilltop Realty's con-

---

Footnote continued—

The evidence shows that out of the five audits excluded from the hypothetical question but included in the evidence, three included showings of Cleveland Heights homes to the white checkers. In the August 22, 1976 Tufts-Pap audit of agent Mayfield, white checker Pap was shown three homes in Cleveland Heights while black checker Tufts was shown one there. In the May 8, 1977 McGee-Butterfield audit of agent Mayfield, the white checker was shown two homes in Cleveland Heights while the black checker was shown three there.

The omission from the hypothetical question of five of the 12 audits in evidence changed the ratio of showings between white and black checkers. Further, nothing is known about the showings to checkers in the 11 HCC audits of Hilltop which were not introduced into evidence. Since Dr. Kain himself stated, "if you change just one number it is obviously going to have an effect on my opinion," his testimony based on the hypothetical is not given any weight.

tinuing practice of making a dwelling unavailable because of race. The 15 incidents in which steering was not found cannot diminish or vitiate either the eight violations, considered individually, or the continuing unlawful practice represented by those eight violations. However, as will be seen, those 15 incidents may affect the nature of the relief to be awarded.

As the court has found in II.E., *supra*, the experiences of 18 of the 22 homeowners who bought homes through Hilltop and were called as witnesses by the defendants are not relevant to a determination of plaintiffs' continuing violation claim because they requested Cleveland Heights or some other specific community and were shown those communities. As to the experiences of the four remaining homeowner witnesses who bought homes through Hilltop, the conduct of the agents showed no violations of section 3604(a). These four instances however, either in number or substance, do not rebut the *prima facie* proof of the eight violations of section 3604(a) constituting a continuing unlawful practice shown by plaintiffs' evidence.

Upon all the evidence, the court finds that defendant Hilltop has engaged in eight violations of section 3604(a). Further, these eight violations constitute a continuing violation of section 3604(a) "manifested in a number of incidents" *Havens*, 455 U.S. at 381.

III. ALLEGED SECTIONS 3604(c) AND 3604(e) VIOLATIONS

A. Section 3604(c) Statements

Plaintiffs assert that Hilltop agents have made "racially preferential statements, whether or not intending to steer." Plaintiffs contend that "the simple making of a

statement which expressly or implicitly expresses a preference, limitation or discrimination, violates [section 3604(c) of] the Fair Housing Act." Disagreeing, defendants interpret section 3604(c) as aimed at written advertisements and argue that "the subsection was not intended to cover an oral statement of preference to a person not the subject of the discrimination."

Section 3604(c)[83] makes it unlawful "to make, print, publish, or cause to be made, printed or published, any notice, statement or advertisement. . . ." These words do not limit the scope of the statute to advertisements.[84] Nor do the three words "make, print or publish" imply a congressional intent to restrict the statute to written "notices, statements, or advertisements." It is presumed that the three verbs of section 3604(c) are not redundant. The verb "make," broad enough to cover all forms of communication, has a usual meaning that differs from the verbs "print" and "publish." If Congress had intended to limit the cause to written expressions of preference, limita-

---

83. Section 3604(c) states that it is unlawful

> to make, print, or publish, or cause to be made, printed, or published any notice, statement or advertisement with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex or national origin, or an intention to make such preference, limitation or discrimination.

84. As stated in *Mayers v. Ridley*, 465 F.2d 630, 633 (D.C. Cir. 1972):

> On its face, the Act prohibits making or publishing any "*notice, statement* or advertisement" indicating a racial preference. Unless the words "notice" and "statement" are to be treated as surplusage, they must mean that the Act prohibits at least some communications which cannot be classified as advertisements. Although the legislative history of this section is sparse, it indicates beyond doubt that as the words themselves suggest, Congress intended to go beyond advertising to reach other sorts of "notices" and "statements" as well. [Emphasis original.]

tions or discrimination, "print or publish" would have been sufficient.[85]

Turning to the meaning of the prepositional phrase "with reference to the sale or rental of a dwelling," it is essential to first note differences between section 3604(a) and section 3604(c). Clause three of section 3604(a) broadly makes it an unlawful housing practice to "otherwise make unavailable or deny a dwelling to any person because of race. . . ." Clauses one and two on the other hand, are limited to a refusal "to sell or rent" or refusal "to negotiate for the sale or rental of . . . a dwelling because of race. . . ." Section 3604(c) is similar to the first and second clauses of section 3604(a) and requires as a predicate of the prohibited housing practice "the sale or rental of a dwelling." Hence, section 3604(c) prohibits only statements by an owner or his agent[86] that pertain to the selling or renting of his dwelling.

---

85. The wording of section 3604(c) was originally included in S.1026 which was introduced but not passed by the 90th Congress. In a draft of S.1026 the phrase "oral or written" preceded "notice, statement, or advertisement" but was later dropped from the text. See *Mayers v. Ridley*, 465 F.2d at 652, n.23 and 25. Although Congress' reason for dropping the modifiers does not appear in the congressional history, it is presumed that the modifiers "oral or written" were deemed superfluous. Had Congress intended that the three verbs "make, print or publish" applied only to written materials, it would have only dropped the modifier "oral."

86. In *United States v. L & H Land Corp., Inc.*, 407 F.Supp. 576 (S.D.Fla. 1976), and *U.S. v. Gilman*, 341 F.Supp. 891 (S.D. N.Y. 1972), the statements that violated the statute were made by apartment managers and reflected policies which, if exercised, would have denied housing to persons because they were black.

In II.D. this court found that Hilltop agent Julian Vanni told agent Stephanie Nicholes that the people he represented were not going to sell to blacks and that if Mr. Nicholes' "buyers were black, we may as well forget it." By making that statement, agent Vanni indicated a racial preference by the seller of a particular property. Thus, this violation of subsection (c) is illustrative of the circumstances under which an agent may violate section 3604(c).

The logic of distinguishing between an owner and a buyer of a dwelling is apparent. A prospective buyer of a dwelling is free to state a preference for living with persons of a particular "race, color, religion, sex or national origin." To prohibit such an utterance might deprive that person of his First Amendment right of free expression. Although his statement may reflect prejudice, the buyer is not able to impose his prejudice "with reference to the sale or rental of [that] dwelling" on others. But when an owner of a dwelling or his agent makes a statement to another person pertaining to the sale or rental of his property based on a "preference, limitation or discrimination based on race. . . .," he is imposing that "preference based on race" on another person "with reference to the sale or rental of [that] dwelling."

Plaintiffs allege that defendant Hilltop violated section 3604(c) on 16 separate occasions through the racially discriminatory comments of various Hilltop agents. Eleven of those comments are attributed to agent Mayfield, and one each to agents Abbott, Russo, Lee, Bernstein and Francis.[87]

Five of the alleged violations involve statements found to have been made by Mr. Mayfield to checkers Patricia

---

87. In their post-trial brief, plaintiffs have cited 18 separate statements which they allege violate section 3604(c). One of the statements was allegedly made by Hilltop agent Angela Stritof to checker Lucille Davis in an audit sponsored by the Cuyahoga Plan in June 1978. Since this court ruled that evidence of the Cuyahoga Plan audit was admissible only as to establishing Hilltop's intent to violate the Fair Housing Act, statements made during the audit cannot serve to constitute a Fair Housing Act violation. Plaintiffs also allege that agent John Mayfield violated the Act by telling checker Pap that it is "just human nature" that owners prefer selling to whites. The court finds that this part of another alleged statement and not a separate one. Hence, the court considers 16 alleged violations instead of 18.

Pap and Ken Kowaleski, or Patricia Pap alone, pursuant to their meeting at an open house at 1688 Maple Road in Cleveland Heights. See *supra* p. 37 [A77].

The first three statements were made at the August 22, 1976 open house. The first statement is not a violation of section 3604(c). By saying his brother-in-law bought a home that needed fumigating from a black family, Mr. Mayfield demeaned that family. Yet the statement did not indicate a policy of racial preference, limitation or discrimination "with respect to the sale of a dwelling."

Mr. Mayfield indicated in his second statement that owners preferred selling to whites rather than blacks. In his third statement he further indicated that Hilltop should sell to whites 80 percent of the time, a policy that limits sales to blacks. Since these statements were general and did not express a preference related to the sale of a specific house, these statements were not made "with respect to the sale of a dwelling." Thus, they do not violate section 3604(c).

On August 25, 1976, Mr. Mayfield made several comments while showing homes to Ms. Pap and Mr. Kowaleski. After showing a home on Englewood, Mr. Mayfield stated that agents showed whites the Englewood area first because there was a high demand for white buyers. This statement indicates that white sellers or their agents preferred to sell to whites instead of to blacks. Since the statement about the Englewood neighborhood was made while leaving a particular house just shown in the Englewood neighborhood, it was "with respect to the sale . . . of a dwelling" and implies that the owner preferred to sell that house to whites. Whether he repeated the preference of the owner to sell to whites or he adopted the preference, the statement is found to violate section 3604

(c). However, his expressions of bewilderment as to why a white person would buy a home in the predominantly black Caledonia school district displayed no racial preference with respect to the selling of a home. Further, the statement was not made in connection with the sale of a particular home in the Caledonia school district. Therefore, section 3604(c) was not violated.

Plaintiffs also assert as violations of section 3604(c) statements made by Mr. Mayfield to Sheryl Porter Tufts at the same August 22, 1976 open house attended by Patricia Pap and Ken Kowaleski. Ms. Tufts was told by Mr. Mayfield that there was "a white lady that had looked at the house, and she decided not to take the home because there were too many black people in the area." Mr. Mayfield also "started pointing out some of the houses where the white people lived and where black people lived." These comments did not reflect a preference or limitation of the owner of the home to sell to a member of a particular race. Therefore, statements made to Sheryl Porter Tufts do not constitute violations of section 3604(c).

On October 19, 1978, agent Mayfield told checker Diana Horrigan that the population of Lyndhurst was "Jewish, WASP and a few Italians." Additionally, while showing a Lyndhurst home with a statue of a black boy in the yard, "[h]e made a reference of being glad that he didn't [take] a black family to see this house." In the same conversation he made reference to a black family in Warrensville Heights with a similar white statue in their front yard. These comments do not indicate the preference of an owner of a dwelling to sell to a member of a particular race.

In May 1977 when white checker Hester Butterfield and her husband considered a home on Scottsdale found on a computer printout, Mr. Mayfield stated, "That end of Scottsdale is over integrated. I know you folks don't mind living in an integrated section but that end is over integrated." While this statement expresses his personal opinion with reference to buying a home on "that end of Scottsdale," the statement does not indicate a preference "with respect to the sale of a dwelling." Therefore, this statement does not violate section 3604(c).[88]

The statement made to white checker Linda Blaser by Mr. Mayfield that she probably would not want her child to go to the predominantly black East Cleveland schools, even though some whites are buying there for the lower prices, was not made with respect to the sale of a particular dwelling. Moreover, while this statement may express Mr. Mayfield's opinions, it did not purport to be the preference of any seller. Therefore, there is no section 3604(c) violation.

Hilltop agent Leo Lee's questioning of black checker Juanita Newsom as to whether she would feel comfortable living in an all white community was not made "with respect to the sale of a particular dwelling" nor does it state the preference of a seller. Therefore, this October 1978 incident does not constitute a subsection (c) violation.

---

88. On rebuttal, plaintiffs offered evidence that Mr. Mayfield in February 1978 told Linda Mendelson that he felt that the seller would be more receptive to her as a buyer because she was white. The statement indicates that the seller preferred to sell to whites rather than blacks and, therefore, would constitute a violation of section 3604(c). Offered in rebuttal, it challenged Mr. Mayfield's denial of any discriminatory statements but cannot be considered as substantive evidence of a subsection (c) violation.

On similar grounds, agent Delores Russo's September 1978 comment to home buyer Jerome Emoff about the Forest Hills area being more than one-half black does not constitute a subsection (c) violation.

In November 1978 checker Hester Butterfield attended an open house given by Hilltop agent Shirley Bernstein. Mrs. Butterfield testified that agent Bernstein said that a particular house "had been well decorated and worked on inside, and taken care of, even though the family that lived there were colored people." Since the house was not for sale, the comment was not made with respect to the sale of a house. It, therefore, does not constitute a violation of section 3604(c).

Plaintiffs assert that Hilltop agent Jack Abbott's statement to home buyer Joseph Calabrese violated section 3604(c). Mr. Calabrese had asked why he and his wife were not shown houses in Cleveland Heights, Shaker Heights and University Heights, and Mr. Abbott responded by asking Mr. Calabrese how he felt about blacks, and did he know that the towns in which Mr. Calabrese wanted to seek housing were integrated. Agent Abbott's statement did not express a preference on the part of an owner to sell to a certain race. Therefore, this statement does not violate section 3604(c).

Plaintiffs assert that agent Paul Francis violated subsection (c) in March 1979 when he told Belita and Howard Gordon that a black family moved away from Lyndhurst after their child was beaten in the high school there. The court finds that the story did not express a seller's preference to sell a dwelling to a certain race and, therefore, does not constitute a violation of subsection (c).

In sum, of the 16 instances in which plaintiffs charge section 3604(c) violations, only one statement is found to

be a violation. This is John Mayfield's statement of August 25, 1976 to auditors Pap and Kowaleski involving the Englewood dwelling and neighborhood. The court has previously ruled that the same statement constituted racial steering under section 3604(a). Since the section 3604(c) violation arises out of the same incident found to be a section 3604(a) violation, the former constitutes part of the continuing violation previously determined.

B. Section 3604(e)

In their third cause of action, plaintiffs in part assert that "within the last six (6) months, two (2) of defendants' agents [Val Vrana and Bruce Johanns] have been convicted in the Cleveland Heights Municipal Court of violations of the City's anti-solicitation ordinance." Plaintiffs next allege "defendants continue to engage in various unlawful discriminatory housing practices." These sentences, read together, are understood to allege that the agents' solicitations violated 42 U.S.C. §3604(e), which makes it unlawful

> for profit to induce or attempt to induce any person to sell . . . any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race. . . .

As the case was finally submitted, the third cause of action proceeded only against defendants Bruce Johanns and Hilltop.[89]

---

89. Pursuant to this court's March 17, 1983 memorandum and order, defendant Vrana's Fed.R.Civ.P. 41(b) motion was granted, and she was dismissed from the case. Agent Johanns' motion was denied. During trial the court ruled that Mr. Johanns' violation of the Cleveland Heights ordinance was inadmissible to show a violation of the Fair Housing Act. However, the facts surrounding that violation were ruled admissible as bearing on the alleged section 3604(e) violation.

To determine whether agent Johanns violated section 3604(e), the court first turns to the issue of whether "representations" were made and if made, the nature of the "representations."

James Ciocia, his wife and his family, reside at 3714 Fenley Road in census tract 1401 of Cleveland Heights. Census tract 1401, in the northeast section of Cleveland Heights, is bounded on the west by East Cleveland, on the north by Cleveland, and on the east by South Euclid. Other streets in census tract 1401 north of Fenley Road are successively Brinkmore Road, Mount Laurel Road, and Runnymede Boulevard. To the south are successively Stoneleigh, Langton, Burbridge and Atherstone Roads.

Mr. Ciocia testified that in August 1978 and again in October of that year he received post cards "signed by Bruce Johanns." He stated that the second was "a virtually identical card . . . to the first post card." The card indicated, as he recalled, "that a house either was for sale on [their] street or had just been sold, and inquired as to whether or not [they] might be interested in discussing the sale of [their] house."

Mr. Johanns testified that he prepared a mailing after a house owned by the Traylors at 3659 Fenley was listed with him on July 12. The cards were then given to Hilltop which mailed them to 40 to 60 residents on Fenley and Stoneleigh Roads. From the Hilltop Realty post card sample manual Mr. Johanns identified a card identical to the one mailed. The card states:

> If you have a friend or relative who would like to live near you, please have them give me a call, and I will be pleased to give them all the details and arrange for them to see it. . . .

The card has a line for the agent's signature and phone number. Hilltop's name is printed on the card.

Two cards signed by Mr. Johanns and addressed to Mr. and Mrs. Ciocia at 3714 Fenley were received into evidence. One of these cards has an August postmark, and the second card is postmarked "29 Sep., 1978." Both cards are signed "Bruce Johanns" above a printed line which states "Residential Counsellor" and "Hilltop Realtors." The printed message on each card stated:

> We have sold the home at 3659 Fenley [address written in by Mr. Johanns]. In selling this property, we came into contact with other families who wish to buy in your neighborhood. Are you interested in selling your property? We would welcome the opportunity of consulting with you without obligation.

Mr. Johanns admitted sending to Mr. and Mrs. Ciocia the post card with the August postmark. Also in his testimony he admitted sending a second card and admitted that it was his handwriting on the card postmarked September 29. However, he did not recall mailing anything in the Fenley-Stoneleigh area in September 1978. Weighing this evidence, it is found and determined that Mr. Johanns did fill out and send to Mr. and Mrs. Ciocia these two Hilltop post cards bearing the printed message previously quoted. It is concluded that these post cards made "representations" to "induce the sale" of a dwelling. Moreover, these representations, made by a real estate agent and broker to a prospective customer, are conclusively presumed to have been made for a commission. Thus, Mr. Johanns made representations to induce the sale of a dwelling for profit through these post cards.

To further determine whether a subsection (e) violation occurred, the court turns to the issue of whether

these representations suggested "the entry or prospective entry into the neighborhood" of blacks. In *Zuch,* 394 F. Supp. at 1049, the court held that "the representations prohibited by section 3604(e) include the subtle, as well as the more obvious, forms of racial inducements to sell," and a representation may be "a violation of the section even if race is not explicitly mentioned." With respect to this issue, *Zuch* states that "the solicitations [must] convey to a reasonable man, under the circumstances, the idea that members of a particular race are, or may be, entering the neighborhood." *Id.*

Mr. and Mrs. Ciocia complained about the Hilltop post cards to the Cleveland Heights Office of Real Estate Programs on August 30, 1978 and October 5, 1978. While the office took no action on its own the office suggested to the Ciocias after their second complaint that they meet with Mr. Johanns. In their meeting with Mr. Johanns, they told him that there was an ordinance in Cleveland Heights that "prohibited that kind of activity." They said they were concerned about the amount of "real estate activity in [their] part of Cleveland Heights."

On direct examination Mr. Johanns testified that he received a telephone call from Mr. Ciocia approximately October 20 and later met with Mr. and Mrs. Ciocia about October 25, 1978. He stated that in their conversation he agreed that he signed a post card shown to him by the Ciocias. When Mr. Johanns' counsel presented the August post card, Mr. Johanns identified that card as the one shown to him by the Ciocias.

Mr. Ciocia testified that when he spoke to Mr. Johanns, he made it clear that he was fearful of the effect of the post cards, in view of the racial composition of the neighborhood. Mr. Ciocia was asked, "Was there any discussion

whatsoever about the matters you have outlined as racial problems in the area in 1978?" He answered:

> Well, yes, there was in a general way. I explained to him why we were concerned, that the law was in existence partly because of what we felt was illicit activity, real estate activity in Cleveland Heights. The law was designed to protect us in that respect. We were concerned about the turnover of homes in Cleveland Heights, and I mentioned a couple other things in a general way. I discussed what our concern had been, why we came out there.[90]

During the interrogation of defendants' witness Charles Russo, a resident of Langton Road in census tract 1401

---

90. Mr. Ciocia summarized the concerns that he had in 1978:

> We were very concerned about the high level of activity, as I think I have indicated, solicitation techniques that were being employed to generate activity. We were concerned about the sale of homes, and we were deeply concerned if you look at this, and I tend to do that, to look at the whole situation, the whole package of circumstances and compare what was happening in the Oxford School district to surrounding areas, we felt we were under seige. I don't know how else to describe it. We felt we were being raped and pillaged by elements over which we had very little control, aside from, perhaps, the enforcement of the anti-solicitation ordinance. And we were very, very anxious about the situation at that point.
>
> Q. And that situation is the concern you had expressed as being your concerns in 1978?
>
> A. Yes. I might just add to that, being situated as we were, where we lived in close proximity to South Euclid. I think that even magnified our concern. Because we were able, because we were experiencing this turmoil in Cleveland Heights and you could look just virtually across the street and see homes being sold, white families moving out, white families moving in. There was virtually no real change in the racial make-up of that part of South Euclid until a little bit later on, and yet our side of the street was a completely different situation.

and a person with experience in the real estate business, defense counsel showed him plaintiffs' exhibit No. 694, the card that Mr. and Mrs. Ciocia received in the mail. Counsel then asked, "If you received a card like that in the mail and you lived on Fenley, would you be concerned that that particular real estate agent was attempting to bring blacks into the neighborhood?" Mr. Russo answered:

> As a resident of Cleveland Heights and abiding by the laws that we have set up for ourselves, you are talking to a person who is in real estate, receiving a card of this kind, I would [have] called Aveni up right away, "what's going on, you know."

Counsel asked him why, and he answered:

> Because it just isn't done in our area, because of integration. There's nobody else in all of Ohio that is integrated but us, and to get something like this is alarming to residents in the area.[91]

Mr. Johanns had knowledge of the racial composition of the neighborhood. Bruce Johanns worked as a painting contractor beginning in 1974 and continued after he became a real estate salesman for Hilltop in May 1977. He had painted homes on several streets in the Oxford area

---

91. In an attempt to circumvent these answers of Mr. Russo, counsel asked him, "If you received a solicitation of that nature, saying that there was a home for sale, and the words on the card, and also received this solicitation saying that there was a listing [in] that area, would that indicate to you that that particular agent was bringing blacks into the neighborhood?" Mr. Russo responded, "No." This answer is of limited probative value because counsel omitted the critical existing circumstance of a racially transitional neighborhood of which a reasonable homebuyer, receiving the card, would have been aware. It is this existing circumstance which Mr. Russo described in this explanatory answer.

where he had seen black children and adults.[92] During the years that Mr. Johanns engaged in painting contracting in the area, the percentage of blacks in Census Tract 1401 was increasing. The Cuyahoga Plan estimates, see *supra* note 6, indicate that by 1977 the nonwhite population was 26 percent. It was 22 percent in 1978; 29 percent in 1979; and 37 percent in 1980. The census statistic for 1980 was 30.7 percent nonwhite (29 percent black).[93] The evidence shows the neighborhoods in census tract 1401, in which Mr. Johanns worked and of which he had knowledge, were racially transitional.[94]

Sales agent Johanns and Hilltop Realty represented that they had come "in contact with other persons who

---

92. He said "he would see black children coming from their front doors, back doors, etc., and going to school, and also maybe some parents going to work." He characterized the streets where he "actually worked" as "integrated." Mr. Johanns' observations of black school children are substantiated by the Oxford Elementary School figures which showed a black enrollment of 47 percent in 1978. See *infra* note 93.

93. The Oxford school district comprised of all of census tract 1401 and parts of census tracts 1403, 1404 and 1405. Plaintiff's exhibit 1044A, a computer printout of 1980 population figures from census data broken down by census blocks, allows a computation of the percentage of black residents by census block in the census tracts which comprise the Oxford school district. In tracts 1403 and 1404 there are census blocks with black populations substantially higher than the 24.9 percent overall black population in Cleveland Heights. Census tract 1401, 31 percent black, contains Fenley and Stoneleigh Roads, the streets to whose residents Mr. Johanns mailed the cards. Fenley is in census blocks 101 and 108 while Stoneleigh is in blocks 101 and 110. According to 1980 census figures, blocks 101, 108 and 110 had percentages black of 23.3, 24.1, and 16.5 respectively. Nine census blocks in tract 1401 are higher than the overall Cleveland Heights percentage of blacks.

94. The terms "racially transitional neighborhood" and "changing neighborhood" do not appear in either section 3604(e) or Title VIII. However, defining these terms, Judge Keith said, "[T]o the layman, either expression [a "racially transitional neighborhood" or a "changing neighborhood"] is used and understood to mean that blacks are moving into an area." *Zuch*, 394 F.Supp. at 1033.

wished to buy in your neighborhood." While the race of such interested entrants into the neighborhood was not specified, given the level of integration and the atmosphere as described in the evidence, each of the 40 to 60 addresses of Fenley and Stoneleigh Roads, white or black, were left with the likely prospect that many or all of the "other persons who wished to buy" were black, and the failure to mention race was intended to mask that likelihood.

Based on Mr. Russo's testimony, Mr. Ciocia's testimony, and other relevant evidence, it is concluded that under the circumstances a reasonable homeowner on Fenley Road or Stoneleigh Road would have believed from the mailings that blacks might be entering the neighborhood. Thus, upon all of the evidence, it is found and determined that the last element of section 3604(e), as articulated in *Zuch, supra,* is satisfied.

Related to this finding is a telephone conversation between Patrick Hollis and defendant Johanns. Mr. Johanns stated that he sent out letters to his "past painting customers on Stoneleigh and Fenley, which number approximately 16 people." Patrick Hollis who lived on Stoneleigh was one of Johanns' past painting customers.

On direct examination Mr. Johanns testified that he had "heard from no one in the neighborhood" about the mailings."[95] Then on cross-examination, Mr. Johanns was asked, "Isn't it a fact, Mr. Johanns, that after you had written the letter to your old painting customers, that Mr. Pat Hollis called you on the phone?" Mr. Johanns

---

95. It was Mr. Johanns' statement on direct examination that he had "heard from no one in the neighborhood" about the mailings which laid the foundation for Mr. Barclay's cross-examination of Mr. Johanns about receiving a call from Mr. Pat Hollis. This further supports the court's ruling that Mr. Hollis's rebuttal testimony was permissible.

admitted that was correct. The question was then asked, "And he told you in August or September of 1978 that you shouldn't be soliciting customers in that area; didn't he?" Mr. Johanns answered:

> Mr. Hollis called me after - as a matter of fact, within a day or two after I had spoken with Mr. Ciocia. When I sent out, along with the card that I sent to the residents on Stoneleigh and Fenley, I also sent a letter to my painting customers, which was mentioned. I also sent a letter to my painting customers along with the second card stating that that house had sold.

He added:

> And Mr. Ciocia came to see me on approximately October 25th, and these letters that I sent out to my past painting customers were sent out a few days prior to my meeting with Mr. Ciocia.

In his rebuttal testimony, Mr. Hollis, on the other hand, places his conversation with Mr. Johanns earlier in time. Mr. Hollis testified that he received some "correspondence" from Johanns between May and July 1978. Mr. Johanns agreed that he sent to Mr. Hollis, a former painting customer, a "general introductory letter in April or May of 1978." This April-May 1978 date is credited, although in earlier testimony he fixed this "introductory" communication "when I first got into the business [in 1977]."

Mr. Hollis thus described the purpose of the "correspondence" from Mr. Johanns:

> Number one, to more or less reintroduce himself and explain that he was now graduated from college and

> working for Hilltop. And secondly, he expressed an interest in handling our house, should we - the sale of our house, that is, should we decide to sell.

Mr. Hollis testified that within 24 hours of the receipt of that correspondence, he called Mr. Johanns. After an exchange of niceties, he went on to say:

> I felt it was my responsibility as an acquaintance and old customer of his to inform him that what he was doing through this correspondence was illegal. And basically what I told him was that my wife and I had signed a non-solicitation card, had filed it with the City, and that solicitation card precluded him from contacting us to solicit the sale of our house.[96]

Further, he testified, "Bruce, he was extremely surprised . . . and he apologized if that caused me any problem." He said he had no further conversation with Mr. Johanns.

Among the letters to his painting customers, Mr. Johanns stated he sent one in conjunction with a card to Fenley and Stoneleigh residents after he obtained the Fenley Road listing of the Traylor Home on July 12. Mr. Johanns said he "also sent a letter to [his] painting customers along with the second card stating that that house had sold [August 13]." Mr. Hollis states that he only received one piece of correspondence, the introductory letter, from Mr. Johanns between May and July 1978.

---

96. In his surrebuttal testimony, Mr. Johanns' description of the content of the introductory letter differs from that of Mr. Hollis. Denying that there was any request for a listing of Mr. Hollis' house for sale, Mr. Johanns stated that he was "a real estate counsellor and offered [his] services if they should be in need" Even if this is what he said in that letter, it was sufficient for Mr. Hollis to treat the letter as a solicitation to sell their home. The fact is that Mr. Hollis did so treat the letter, which explains his prompt followup telephone call to Mr. Johanns.

This is corroborated by the similar experience of Eli Follick, another painting customer of Mr. Johanns.[97]

Mr. Pat Hollis' insistence that his telephone complaint to Mr. Johanns was made shortly after he received between May and July 1978 an introductory letter from Mr. Johanns is more credible than Mr. Johanns' timing of the Hollis call in late October. Mr. Johanns' statement is not credited.

Mr. Johanns' testimony that Mr. Hollis did not call him until after Mr. Johanns received the visit from Mr. and Mrs. Ciocia on or about October 25, 1978 is not credited for another reason. Mr. Johanns testified that he sent to Mr. Hollis "a total of five mailings."[98] It is not credible that Mr. Hollis would hold off making an anti-solicitation complaint until he had received from Mr. Johanns five solicitations to sell his home. It is more probable, as Mr. Hollis testified, that he called Mr. Johanns to complain immediately (he said within 24 hours) after receiving Mr. Johanns' introductory Hilltop Realty letter in April or May 1978.

---

97. Shown the various Hilltop form post cards (one of which was used on two accasions by Mr. Johanns mailing cards to Mr. and Mrs. Ciocia), Mr. Follick was asked "if any of the forms here are the ones you received from Bruce Johanns?" He answered, "No, I do not recollect any of them."

Mr. Follick further testified that about one year after having the interior of his Fenley Road home painted in 1977, he received a mailing from Mr. Johanns. The substance of the mailing was that Johanns "was associated with Hilltop Realty and in real estate." Like Mr. Hollis, Mr. Follick recalls receiving from Mr. Johanns only the introductory letter and not any other card.

98. These would have included the introductory letter and "four after [he] received the listing." Three mailings would have been sent to him as a painting customer and two as a Stoneleigh resident, who would have received the two Fenley-Stoneleigh mailings.

The court finds that Mr. Hollis complained after the first Johanns' mailing rather than after five; this permits the parallel inference that Mr. Hollis notified Mr. Johanns of the perceived violation of the Cleveland Heights Anti-Solicitation Ordinance before Mr. Johanns mailed the August and October post cards to Mr. and Mrs. Ciocia.[99]

To have persisted in mailing solicitation cards after being notified that he should not be soliciting Cleveland Heights residents to sell their homes who had signed anti-solicitation notices, Bruce Johanns demonstrated that his solicitations were not accidental but clearly intentional. To have intentionally solicited in a neighborhood that he knew was racially transitional and, therefore, subject to the fears of panic selling, rendered his acts of solicitation at least reckless.

Previously this court has found that the message on each of the post cards mailed by defendants Johanns and Hilltop to James Ciocia constitute "representations" made "to induce or attempt [persons] to sell" their "dwelling[s]." This requirement of section 3604(e) is articulated in *Zuch*, 394 F.Supp. at 1049, as the second element, *i.e.*, "that the solicitations are intended to induce the sale of a dwelling." Even if this second element is construed to require that the solicitor must intentionally or recklessly induce or attempt to induce the sale of the recipient's dwelling by "representations regarding the entry or prospective entry into the neighborhood of . . . persons of a particular race," this second element has been established in this case.

---

99. Mr. Hollis testified that he believed that at the time he received the letter in May through July 1978, "any solicitation violated the Anti-Solicitation Ordinance." As the basis for his belief, he stated:

> I felt the whole act of signing and filing a card prevented me from being harrassed by real estate people . . . to: No. 1, sell my house; and No. 2, to disrupt the neighborhood.

It is determined that Bruce Johanns violated section 3604(e), and his acts as a Hilltop sales agent are also imputed to Hilltop Realty. *Marr v. Rife, supra.* Hilltop Realty printed and supplied to its sales agents the solicitation cards which were used by sales agent Johanns.[100] Hilltop Realty also paid for the metered postage on the cards and mailed the cards to the residents of Fenley and Stoneleigh Roads. Thus, Hilltop expressly participated in Mr. Johanns' unlawful solicitation and is, therefore, directly liable. Further, this constitutes express corporate intent to not obey the Fair Housing Act, and this corroborates the court's previous finding of corporate intent. See *supra* pp. 158-59 [A169-70].

With respect to any injury caused by this solicitation, there is no evidence that any homeowner contacted Bruce Johanns to put up a house for sale. But there was actual injury nonetheless. Mr. and Mrs. James Ciocia and Mr. and Mrs. Pat Hollis had each signed a Cleveland Heights "Notice to Discontinue Real Estate Solicitations," a right granted them by Ordinance 27-1976. Bruce Johanns' mailing of solicitation cards to the Ciocias and Hollises violated the Cleveland Heights policy of controlling real estate solicitation embodied in Ordinance 27-1976. Since the City expended money to enforce the ordinance against him, Bruce Johanns' violation of the ordinance caused a distinct and palpable injury to the City. However, the evidence does not show that the violation caused injury to HCC.

In addition, had not Mr. and Mrs. Ciocia and Mr. Hollis contacted Mr. Johanns to put a stop to his violation

---

100. Significantly, Hilltop's principal post card manual contained no notice to the sales agents that post cards may be illegal under the Cleveland Heights Anti-Solicitation Ordinance.

of the Cleveland Heights ordinance, additional injury in the form of panic selling may have occurred. As Mr. Russo testified with reference to the solicitation card:

> There's nobody else in all of Ohio [that] is integrated but us, and to get something like this is alarming to residents in the area.

Thus, there was both actual and threatened injury to the City that flowed from the mailing of the solicitation cards.

IV. STATUTE OF LIMITATIONS

Of the eight section 3604(a) violations, one described in II.B.(10), occurred within the 180-day period prior to the filing of plaininggs' complaint. As in *Havens,* 455 U.S. at 381, if "at least one" of the eight incidents "occurred within the 180-day period," then the "unlawful practice . . . continue[d] into the limitations period." Therefore, the "complaint is timely," and each of the eight incidents is rendered timely.[101] *Id.* Additionally, the incidents described in II.B.(8) and B.(14) were found to be racial steering but were not counted as part of the continuing unlawful practice because the steering was not into or away from Cleveland Heights. However, since these incidents occurred within the limitations period, they corroborate the finding that Hilltop's section 3604(a) unlawful practice continued into the limitations period.

The court determined in III.B. that defendants Johanns and Hilltop engaged in racial solicitation which violated section 3604(e). Since the last of the card solicitations

---

101. The section 3604(c) violation arises out of the same incident found to be a section 3604(a) violation and is, therefore, part of the continuing violation. Hence, the unlawful practice is made up of nine Fair Housing Act violations arising from eight incidents.

was received on September 29, 1978, this incident also occurred within the 180-day limitations period.

V. LIABILITY OF VINCENT T. AVENI

The plaintiffs assert in their post-trial brief that vicarious liability for the acts of Hilltop agents is imputable not only to defendant Hilltop but also to Vincent T. Aveni. Since 1967, Vincent T. Aveni and his brother Joseph have been co-owners of Hilltop Realty, Inc. Vincent T. Aveni is also president and chief operating officer. In 1981 Hilltop Realty, Inc. purchased all the stock of HGM and now does business under the name of HGM Hilltop. Hilltop Realty, Inc. is licensed, as broker, to engage in the real estate business by the Ohio Department of Commerce, Division of Real Estate. Vincent T. Aveni and other associates of Hilltop retain their broker's licenses. These licenses are attached as addenda to Hilltop's broker license. Each sales agent associated with Hilltop is a party to an "independent contract" with Hilltop Realty.

A broker under contract with its agents has a nondelegable duty to obey the Fair Housing Act. *Marr v. Rife,* 503 F.2d at 741. Thus, Hilltop Realty is liable for the imputed acts and statements of those agents who participated in the eight violations of section 3604(a) and the sections 3604(c) and (e) violations found by this court. However, since the sales agents in those violations have a contractual relationship with Hilltop as broker and not with Vincent T. Aveni as broker, their acts and statements may not be imputed to him under *Marr v. Rife.*

Further, vicarious liability may not be imposed on Mr. Aveni because of his other roles at Hilltop Realty, Inc. Since he is not sole owner of the company, his partial stock ownership would not permit a per se piercing of

the corporate veil.[102] Moreover, his status as president and chief operating officer in and of itself does not render him personally liable for acts of the corporation or its agents or employees. See *Tillman v. Wheaton-Havens Recreation Ass'n, Inc.*, 517 F.2d 1141, 1144-45 (4th Cir. 1975); *Lobato v. Pay-less Drug Stores*, 261 F.2d 406, 409 (10th Cir. 1958). To impose vicarious liability upon Mr. Aveni as president and chief operating officer for the acts of the Hilltop agents who participated in the continuing violation found by this court, it is essential to show that he participated in their acts or knew of and ratified their acts and statements.[103]

---

102. Stockholders of a corporation generally are not personally liable for the acts of their corporation unless the record justifies piercing the corporate veil. *Export Credit Corporation v. Diesel Auto Parts Co.*, 502 F.Supp. 207 (S.D.N.Y. 1980). No claim was made in this case that the corporate veil should be pierced, nor was any evidence offered to support such a claim. Hence, the court does not need to determine whether relevant factors set forth in *Bucyrus Erie Co. v. General Products*, 643 F.2d 413, 418 (6th Cir. 1981), have been satisfied, nor whether the "alter ego" requirements have been met. See *United States v. Pisani*, 646 F.2d 83, 85 (3d Cir. 1981).

103. Mr. Aveni lectured on fair housing as part of Hilltop's "central training" of its sales agents. As part of this program, Mr. Aveni instructed them on the Fair Housing Act. Beginning in late 1976 or early 1977, he used a pamphlet supplied by the National Association of Realtors. He said he "would go into primarily the various aspects as the pamphlet describes the Fair Housing Law and particularly would get into the questions concerning the conduct of the agent." He used the book in his discussion of racial steering. To the best of his recollection he told the agents:

> Well, racial steering is the agent's effort to steer a minority into an integrated area, and it is the agent steering a white out of an integrated area into an all-white area, and that any, you know, effort upon the [part of the] agent to do so in essence was a violation of the Fair Housing Law.

Mr. Aveni's instruction on this subject does not exonerate Hilltop's imputed liability for the racial steering incidents previously found to have been committed by Hilltop agents. However, Mr. Aveni's instruction on racial steering does emphasize the necessity of the plaintiffs' producing direct evidence of his participation in those racial steering incidents in order to render him liable for those incidents.

The plaintiffs point to Mr. Aveni's signing of the Voluntary Affirmative Marketing Agreement (VAMA) in March 1977 and his discussion of the agreement at the Quail Hollow breakfast meeting of the company and sales agents on April 20, 1977. There he explained the "meaning and content of the agreement and the importance of adhering to it." In this meeting he also asked associates "to keep track of all their prospects as to race, and houses shown to each prospect." Later, that request was rescinded. Therefore, no effort was made by the company to put into effect the form in the "Affirmative Marketing Handbook", circulated to Hilltop's sales agents, which among other things provided a line on which to record the race of the prospective buyer. Hilltop has not prescribed a uniform prospect interview form, though it does require the use of some standard forms, *e.g.*, standard listing agreements. Nor does Hilltop or Mr. Aveni require agents to record information on race of the buyer.

Plaintiffs argue that if Hilltop and Mr. Aveni had required the use of a form that recorded the race of a prospect, management would have been able to "monitor the performance of associates in carrying out the terms of [the Affirmative Marketing] agreement." Hence, it is contended that since Hilltop and Mr. Aveni did not require the use of either the VAMA form or its equivalent that would have recorded the race of a prospect, Mr. Aveni is chargeable with the failure to learn of and stop any steering activities of its agents. It is said that these failures make him a participant in their steering activities and therefore liable for their actions.

The failure of Hilltop and Mr. Aveni to have required the use of a uniform prospect interview form which recorded the race of a prospect is inconsistent both with Mr. Aveni's act of signing the affirmative marketing agreement

and with his instructions to the sales agents at the April 20, 1977 Quail Hollow meeting. However, record keeping of prospects by race, while recommended by the "Affirmative Marketing Handbook," is not mandated by the Fair Housing Act. Hence, the court concludes that it may not find that Mr. Aveni's failure to require the use of such a prospect interview form in effect made him a participant in the acts or statements of the Hilltop agents which comprise the violations of section 3604 found by this court.[104]

For these reasons it is concluded that defendant Aveni may not be found liable for the section 3604 violations previously found by the court and imputed to defendant Hilltop.

VI. INJURIES AND RELIEF

A. Injuries

It is concluded that defendant Hilltop's section 3604(a) continuing violation and its section 3604(e) violation, heretofore found, have caused distinct and palpable injury

---

104. In *United States v. Youritan Construction Co.*, 370 F. Supp. 643 (N.D. Ca. 1973), *aff'd in relevant part*, 509 F.2d 623 (9th Cir. 1975), the court held a defendant construction company and its owner and operator liable for the racially discriminatory preferences of rental agents in violation of the Fair Housing Act. In holding the owner liable, the court concluded that "owners and supervisors are responsible for the conduct of their agents," *id.* at 649, but the court did not discuss the legal theory upon which the owner's liability was based. Nevertheless, the court in *Youritan* noted that:

> Defendants [construction company and its owner] have instructed their apartment managers to seek prospective tenants who fit in with present tenants. Prospective compatibility with other tenants is not an appropriate rental consideration where its application would have a discriminatory racial impact.

Id. at 650. Thus, in *Youritan* the owner affirmatively participated in the discriminatory conduct of its agents through the owner's instructions to its managers. In the instant case there is no evidence of similar affirmative participation by Aveni in the racial steering of Hilltop's agents.

and has threatened further injury to the City.[105] It is essential to detail the injuries sustained by the City in order to pass on the City's claims for injunctive relief.

Financing the City's efforts to maintain an open and stable integrated community withou resegregation has cost the City money. According to City Manager Richard V. Robinson, the total expenses assigned to fair housing activities was $281,526 during 1978 and $287,254 during 1979.[106]

---

105. At an earlier stage of this case, the court in its memorandum and order of December 31, 1980 ruled that plaintiffs had alleged sufficient "actual or threatened injury" to satisfy the requirements under Article III for standing. *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 99 (1979). Nevertheless, defendants have again raised the issue of standing in their post-trial brief, asserting that in *Bellwood* "the court emphasized that the allegations relating to standing remain to be proven at trial." Defendants refer to the Court's conclusion that:

> [T]he facts alleged in the complaints and revealed by initial discovery are sufficient to provide standing under Art. III. It remains open to petitioners, of course, to contest these facts at trial.[31] The adequacy of proof of respondent's standing is not before us, and we express no views on it. [Footnote omitted.] *Id.* at 115.

In n.31, the court observed:

> 31. Although standing generally is a matter dealt with at the earliest stages of litigation, usually on the pleadings, it sometimes remains to be seen whether the factual allegations of the complaint necessary for standing will be supported adequately by the evidence adduced at trial. *Id.* at 115.

To make standing an issue that must be proved by the plaintiff at trial would overturn the Court's fundamental concept that by virtue of Article III of the Constitution, standing is a "threshold question." *Linda R. S. v. Richard D.,* 410 U.S. 614, 616 (1973). Even if defendants are correct, however, and the allegations relating to standing need to be reconsidered at trial, it is clear that the record provides facts which are sufficient to support plaintiffs' pretrial allegations of actual and threatened injury.

106. The largest component of the total for each year is money spent for public relations and community relations. In 1978 this was $116,887, and in 1979 the amount was $101,100.

(Continued on following page)

Defendants objected to the interrogation of City Manager Robinson about financial information prepared by the City's finance department (plaintiffs' exhibit No. 1069), which underpinned his testimony on injury to the City. In part, defendants' objection was that

> [t]he Supreme Court in *Bellwood* did not provide for these types of expenditures by the city with respect to the type of injuries they envisioned that the city could sue for with respect to the standing issue.

Plaintiffs pointed out that Mr. Robinson's testimony indicated that "these funds are expended to combat the illegal practices of the real estate industry." Plaintiffs further called attention to Dr. John Kain "testifying to the damage which discriminatory housing practices do to the city." The court ruled:

> Here, where the damages are not being offered really as a basis for claiming money, but as a basis really for the relief of injunctive or declaratory nature that is sought, I think there is a sufficient nexus established in this record [through] the testimony of Dr. Kain

---

Footnote continued—

Mr. Robinson explained that to better community relations, a full-time and a part-time employee were hired as "liaisons for the various school districts." These community relations workers conduct street meetings and block club meetings, and work with the Heights Community Congress and with the neighborhood associations. They help, he said,

> to keep peace in the community, to kind of smooth over fears that people may have in neighborhood areas when they feel that, in this particular case, when housing is not being maintained, or perhaps when it is being sold in a fashion that they feel is incorrect.

The next largest item is money spent for the "Heights Housing Service". In 1978 this was $106,666, and in 1979 it was $107,863. The Housing Service office conducts the "Escort Program [for prospective new homeowners] and the program that keeps track of . . . statistics of housing sales in Cleveland Heights."

> and also through other witnesses, including Barbara Roderick, that I think justifies examination of this witness on these items.

The court now reaffirms that ruling and credits Mr. Robinson's testimony.

It is concluded that the expenditure of funds to combat what the City reasonably perceived to be illegal real estate practices, including racial steering and racial solicitation, constitutes a distinct and palpable monetary injury to the City. These expenditures, while voluntary, were necessitated by the City's policy to promote a stable, integrated community and to ward off the resegregation of its various neighborhoods and the City as a whole. The development of this municipal policy was covered in part I.A., of this opinion.

Threatened injuries to the City have also been proved in the evidence. The population trends document in part I.A. show that forces toward resegregation were then occurring in some areas of Cleveland Heights. One example of that is provided by agent Mayfield's showing of a home to a black prospective buyer on a "mostly black" street in Cleveland Heights. Dr. Kain testified that "the increase in black population is a result of many factors in Cleveland Heights." The forces of resegregation if allowed to proceed unchecked, would probably cause diminishment of the City's tax base as recognized in *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 110-11 (1979). The soundness of the tax base in years 1976 through 1978[107] does not preclude the existing threat

---

107. Defendants note that the City's application for Community Development Block Grant funds, dated February 5, 1979 and signed by City Manager Robinson, revealed that there was

(Continued on following page)

of a diminished tax base if tendencies towards resegregation were to accelerate. Threatened injury to the City results from the forces of resegregation, and a continuing violation of the Fair Housing Act, which has been found, is one of those forces which leads to resegregation.

In illustrating that "other harms" may flow "from the realities of a racially segregated community," the Court in *Bellwood* notes that "school segregation is linked closely to housing segregation." *Id.* at 111, n.24. Increases in black enrollment in certain elementary schools in Cleveland Heights, and actions to offset disproportionate increases in certain schools in the Cleveland Heights - University Heights school district, are sufficient to show that school segregation is an injury that threatens the City and which results from the forces of resegregation.[108]

Footnote continued—

an increase in real estate values from 1976 to 1977 of 14.9 percent in Cleveland Heights. This percentage was compared with the following increases: East Cleveland, 5.6 percent; Euclid, 13.4 percent; Lyndhurst, 13.8 percent; Mayfield Heights, 13.3 percent; Richmond Heights, 14.6 percent; Shaker Heights, 18.6 percent; South Euclid, 11.6 percent; and University Heights, 11.7 percent. In addition, figures for "estimated change in value 1976-1979" showed the following increases: Cleveland Heights, 44.7 percent; East Cleveland, 16.8 percent; Euclid, 40.2 percent; Lyndhurst, 14.4 percent; Mayfield Heights, 39.9 percent; Richmond Heights, 43.8 percent; Shaker Heights, 55.8 percent; South Euclid, 34.8 percent; and University Heights, 35.1 percent. City Manager Robinson testified that this showed that "the values had been undervalued for so long that they were starting to catch up in that period."

108. Oxford Elementary School (census tract 1401, and parts of 1403, 1404 and 1405) had a black enrollment of .37 percent in 1970, 11.6 percent in 1974, 17.61 percent in 1975, 36.27 percent in 1977, and 47.01 percent in 1978.

Milliken school district (census tract 1408 and part of 1409) had a black enrollment of 6.46 percent in 1970, 43.53 percent in 1974, 53.16 percent in 1975, 62.98 percent in 1977 and 69.31 percent in 1978.

(Continued on following page)

In the ruling of December 31, 1980, this court declared that "HCC may press a monetary claim to the extent of funds expended as a result of defendants' practices." Now that the evidence has been received, the court first considers HCC's request for "Market Share" damages.

The plaintiff Heights Community Congress seeks what it terms "Market Share" damages. Starting with HCC's "proportional budget" of $79,300 for the period September 1978 through May 1979, it attributes 43 percent of that total, or $34,120, to the costs of real estate monitoring and neighborhood organizing. Since Hilltop's market share during that period was 12 percent of real estate sales in Cleveland Heights, HCC calculates that "Hilltop costs HCC $9,522 for that period." It then states, "If the market share would be calculated against monitoring costs alone, the cost would have been $4,094."

The difficulty with HCC's claim for damages lies not in the above calculations. Rather, the fault lies in HCC's failure to produce evidence that causally connects Hilltop's section 3604 violations to HCC's expenditure of monies for monitoring ($4,094) or the more inclusive costs of ($9,522).

Footnote continued—

Taylor School (parts of census tracts 1406, 1407, 1409, 1415, 1416 and 1417) had a black enrollment of 9.78 percent in 1970, 52.84 percent in 1974, 62.84 percent in 1975, 70.05 percent in 1977, and 74.76 percent in 1978.

Determining that any elementary school that had a racial makeup of plus or minus 15 percent of the average of all elementary schools was racially isolated, the Cleveland Heights - University Heights school district closed Milliken School in 1978 and redistricted the remaining elementary schools. Junior high schools were also redistricted, and a voluntary transfer program was instituted. One magnet school was established in 1978, a second magnet school in 1979, a third was programmed, and a school community relations program was established.

Lana Cowell, Executive Director of HCC, was asked the following question by counsel for Hilltop and Mr. Aveni: "You mean to tell me if Hilltop did not exist you wouldn't still be out their monitoring other real estate brokers and organizing neighborhood organizations and conducting New Homeowner Questionnaires?" She answered, "Yes, we probably would." HCC produced no evidence that monitoring costs would have been reduced "if Hilltop did not exist."

As a second type of damage, plaintiff HCC seeks "perceptive impairment" damages. The basis for this claim is the language in *Havens Realty Corp. v. Coleman,* 455 U.S. at 365:

> If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income homeseekers, there can be no question that the organization has suffered injury-in-fact.

Summing up its argument for these damages, plaintiff urges:

> In effect, the HCC has been emasculated since 1974 in stopping Hilltop from engaging in housing illegalities. It has been made helpless in its struggle to enjoin this aspect of pressure on the community, despite meetings, audits, surveys, advocacy of stronger local legislation, etc. Hilltop's actions have created the kind of "perceptive impairment" damages which rest within the sound discretion of the court. . . . The value to be placed on correcting HCC's "perceptive impairment" should far exceed the amount reflected in the "market share" damages it has already incurred because of Hilltop.

The evidence shows that HCC has engaged in activities of the type described above. It shows that Hilltop was among those realty firms monitored both by audits, by new homeowner questionnaires, and in other ways; that this monitoring was part of HCC's ongoing activities to carry out its policy of maintaining Cleveland Heights as an open and integrated community; and that it has been necessary to expend funds to finance these monitoring activities. This shows a type of general injury to HCC which is sufficient to permit HCC to join with Cleveland Heights in seeking injunctive or declaratory relief, if otherwise justified. See also, *supra* note 19.

A different situation is presented with reference to HCC's claim for monetary damages for either "perceptive impairment" or "market share" damages. No evidence was offered by plaintiff HCC to show that any of the foregoing described activities were targeted only at Hilltop. Instead, the evidence indicates that the activities are directed at the entire real estate industry operating in Cleveland Heights as well as against any other forces operating in the community which HCC believes is antagonistic to its policy of maintaining Cleveland Heights as an open and integrated community. It is concluded that plaintiff HCC's evidence fails to establish that HCC's expenditures in carrying on its various activities to maintain an open and integrated community were directly caused by violations of the Fair Housing Act by either defendant Hilltop or the other defendants. Hence, the claim for monetary damages is not established.[109]

---

109. Plaintiff HCC bases a claim for damages for denial of the "right" of fair housing on *Curtis v. Loether*, 415 U.S. 189, 195 (1974), which plaintiff HCC argues established "the 'right' of fair housing." In *Loether*, the Court creates no such right.

(Continued on following page)

B. Relief

In a section of their post-trial brief entitled "Impact and Remedy," the plaintiffs request that this court "fashion a form of relief which would correct the effect of unlawful conduct." Principally, the plaintiffs ask the court for an injunction which would order defendant Hilltop to establish "a record keeping system which would track prospects on the basis of race." The prerequisite for granting an injunction in a Fair Housing Act case is first a determination "that there exists some cognizable danger of recurrent violations." *United States v. Warwick Mobile Homes Estates*, 558 F.2d 194, 197 (4th Cir. 1977). This conforms to the general law on injunctions, 42 Am.Jur.2d, *Injunctions*, ¶4, (1969).

The eight incidents which comprise the section 3604(a) continuing violetion and the section 3604(e) violation span the years 1976 through February 1978. No evidence covers any incident involving Cleveland Heights that occurred after September 1978. Neither the actual violations nor the incidents which only reflect corporate intent permit any inference that either the agents who were involved in those incidents or the corporation itself are likely to engage in further acts of racial steering.

Notably, John Mayfield, whose conduct was found to constitute racial steering in four of the incidents, left the

---

Footnote continued—

The Court ruled that "a damages action under §812 is an action to enforce 'legal rights' within the meaning of our Seventh Amendment decisions." *Loether* considered the Fair Housing Act only with reference to a section 812 claimant's *right* to a jury trial. Moreover, in *Loether* the damage claims under the Fair Housing Act were asserted by individuals, not by organizations. Whatever claims for damages under the Fair Housing Act an organization may have are governed by *Havens Realty Corp.*, 441 U.S. at 378, 379.

company in early 1979 before this action was filed. Other agents who were involved in some of the incidents are no longer with the company.

In 1980 the corporation closed its Heights office for economic reasons. While Hilltop's market share of Cleveland Heights real estate business was 12 percent in 1978-79, the percentage had dropped to 3 1/2 percent by 1982.

These facts, considered separately and jointly, reveal no foundation for a conclusion that there is now a likelihood of a continuing violation or a threat of a future violation.

Finally, an additional consideration militates against the issuance of an injunction. The section 3604(a) continuing violation and the section 3604(e) violation have been proved and imputed to Hilltop Realty, Inc. At the same time, with reference to 17 other section 3604(a) incidents advanced by the plaintiffs, the court concluded there had been no racial steering into or away from Cleveland Heights. In addition to these 17, with reference to four homeowners called by the defendants as witnesses, the court found no steering. These 21 incidents of no steering involving Cleveland Heights offer an additional ground for concluding there is no likelihood of a threat of a future violation. Hence, there is no basis upon which this court might issue an injunction granting the affirmative relief that plaintiffs request.

However, eight acts of agents making unavailable a dwelling because of race have been established and imputed to Hilltop. Each is declared to violate section 3604(a) of the Fair Housing Act. Further, the eight acts are declared to be "an unlawful practice that continues" through 1976, 1977 and 1978 "into the limitations period." *Havens,* 455 U.S. at 381.

There is precedent for granting declaratory relief rather than injunctive relief in this Fair Housing Act case. In *United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972), the court upheld a district court's granting of a declaratory judgment instead of the requested injunctive relief for violations of the Fair Housing Act. The appeals court found no abuse of discretion and agreed that given the nature of defendant's violations, he was "sufficiently unlikely to continue violating the Act as to make injunctive relief not warranted." [Footnote omitted].[110] *Id.* at 220.

VII. ORDER

1. Upon the findings of fact and conclusions of law heretofore made and for the reasons which have been stated, it is determined and declared:

a. Defendant Hilltop Realty, Inc. has engaged in violations of 42 U.S.C. §3604(a) in the eight incidents specified in part II.B., pp. 31-114 [A72-135].

---

110. In *Hunter*, at 219, n.19, the court acknowledged that "[d]eclaratory relief is among the possible remedies available to the District Court under §3613." That action was brought under section 3613, which allows enforcement of the Act by the Attorney General. The present action was brought under section 3612, which allows enforcement of the Act by private persons. Section 3612(c) states in part:

> The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, *or other order*. . . . [Emphasis added.]

Rule 54(c) of the Federal Rules of Civil Procedure states in part:

> Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

Therefore, by either section 3612(c) or Fed.R.Civ.P. 54(c), this court may enter a declaratory judgment in this matter if it is deemed appropriate.

b. None of the eight incidents is barred by the 180-day period of limitations of 42 U.S.C. §3612(a), see part IV, pp. 188-89 [A191-92].

c. In the one instance specified in part III.A., p. 166 [A174-75], the statement violates 42 U.S.C. §3604(c).

2. With reference to the count 3 claim against defendant Bruce Johanns and defendant Hilltop Realty, Inc., it is determined and declared that said defendants violated 42 U.S.C. §3604(e) as specified in part III.B., pp. 170-87 [A178-91].

3. With reference to the claims against defendant Vincent T. Aveni, Evelyn Gardner and Shirley Bernstein, see parts V., II.B.(9) and B.(11) respectively, the claims are not sustained and are dismissed.

IT IS SO ORDERED.

/s/ WILLIAM K. THOMAS
U.S. District Court Senior Judge

JUDGMENT ENTRY OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed October 2, 1985)

Nos. 84-3427/3442

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HEIGHTS COMMUNITY CONGRESS, on and behalf of itself and all black and white persons residing in Cleveland, Heights, Ohio; CITY OF CLEVELAND HEIGHTS, OHIO,

Plaintiffs-Appellees (84-3427),
Plaintiffs-Appellants (84-3442),

v.

HILLTOP REALTY, INC.; VINCENT AVENI; and BRUCE JOHANNS,

Defendants-Appellants (84-3427),
Defendants-Appellees (84-3442).

ON APPEAL from the United States District Court for the Northern District of Ohio, Eastern Division.

Before: MERRITT and KENNEDY, *Circuit Judges;* and PHILLIPS, *Senior Circuit Judge**.

JUDGMENT

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

---

*Honorable Harry Phillips participated in oral argument but due to his death on August 3, 1985 took no part in the opinion.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed in part and reversed in part.

Each party is to bear its own costs on appeal.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

Issued as Mandate: October 24, 1985

CONSTITUTIONAL PROVISIONS

United States Constitution, Art. III, §2, Cl. 1

Section 2, Clause 1. Jurisdiction of Courts

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

United States Constitution, Amend. 1

AMENDMENT 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATUTES

42 U.S.C. § 3604

§ 3604. Discrimination in sale or rental of housing

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

(c) To make, print, or publish, or cause to be made, printed or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intenton to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations re-

garding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin.

42 U.S.C. § 3612

§ 3612. Enforcement by private persons

Civil action; Federal and State jurisdiction; complaint; limitations; continuance pending conciliation efforts; prior bona fide transactions unaffected by court orders

(a) The rights granted by sections 3603, 3604, 3605, and 3606 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred: *Provided, however,* That the court shall continue such civil case brought pursuant to this section or section 3610(d) of this title from time to time before bringing it to trial if the court believes that the conciliation efforts of the Secretary or a State or local agency are likely to result in satisfactory settlement of the discriminatory housing practice complained of in the complaint made to the Secretary or to the local or State agency and which practice forms the basis for the action in court: *And provided, however,* That any sale, encumbrance, or rental consummated prior to the issuance of any court order issued under the authority of this Act, and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the existence of the filing of a complaint or civil action under the provisions of this Act shall not be affected.

(3)

Supreme Court, U.S.
FILED
JAN 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1157

In the Supreme Court of the United States

October Term, 1985

HILLTOP REALTY, INC.,
Petitioner,

vs.

CITY OF CLEVELAND HEIGHTS and
HEIGHTS COMMUNITY CONGRESS,
Respondents.

ON PETITION FOR CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

DONALD K. BARCLAY, *Counsel of Record*
Director of Law
KATHRYN GONSER ELOFF
Assistant Law Director
City of Cleveland Heights
2953 Mayfield Road
Cleveland Heights, Ohio 44118
Phone: (216) 371-6660
Attorneys for Respondent City of Cleveland Heights

AVERY S. FRIEDMAN
701 Citizens Building
Cleveland, Ohio 44114
Phone (216) 621-9282
Attorney for Respondent Heights Community Congress

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

5-1

TABLE OF CONTENTS

OPINIONS BELOW 1

STATEMENT OF THE CASE 2

ARGUMENT 4

I. Plaintiffs Established The Elements Of Standing At Each Step In The Litigation Below 4

A. The City's Standing Is Based Upon Both Real And Threatened Injury 5

B. The District Court Applied the Correct Standard In Deciding Standing 7

C. The District Court Properly Found That The HCC Had Standing 8

D. This Case Meets The Article III Case Or Controversy Requirement 10

II. The District Court Defined, And Then Properly Applied, The Standard Of Continuing Violation 10

A. Plaintiffs Met The 180-Day Requirement By Establishing One Violation Within That Period 11

B. The District Court Properly Found That Hilltop Had Engaged In A Continuing Violation Of Title VIII 12

C. Hilltop's Reliance Upon Title VII Case Law Is Misplaced 13

III. The District Court Both Applied The Proper Standard And Engaged In A Detailed Factual Analysis In Order To Determine That Hilltop Violated 42 U.S.C. Section 3604 14

IV. The First Amendment Analysis Need Not Be Reached Since The District Court Based Its Findings Upon The Total Circumstances And Did Not Limit Itself To The Illegal Speech 17

A. The Violations Of Sec. 3604(a) Were Not Limited To Mere Discriminatory Statements 17

1. Patricia Pap 17
2. Cheryl Porter Tufts 19
3. Patricia Pap 20
4. Linda Blaser 20
5. Jerome Emoff 21
6. Joseph and Mary Calabrese 22
7. Howard Gordon and Belita Tisder Gordon 22

B. The District Court's Findings Are Consistent With The Correct Standards Used To Analyze First Amendment Protection Of Commercial Speech 23

1. No constitutional protection attaches to speech that is false, misleading or unlawful 25
2. Even if the Petitioner established that its speech was lawful, the Petitioner cannot succeed under the analysis of Central Hudson Gas 26
3. The substantial government interest is set forth in Title VIII itself 27

V. Petitioner Fails To Demonstrate Special And Important Reasons Why A Writ Of Certiorari Should Issue 27

CONCLUSION 28

APPENDIX:

Order of the United States District Court (May 10, 1984) A1

Memorandum and Order of the United States District Court (April 30, 1984) A3

TABLE OF AUTHORITIES

Cases

Brandenburg v. Ohio, 395 U.S. 444 (1969) 26
Casbah, Inc. v. Thone, 651 F.2d 551 (8th Cir. 1981), *cert. den.* 455 U.S. 1005 (1982) 25
Central Hudson Gas & Electric Corp. v. Public Services Commission of New York, 447 U.S. 557 (1980) 23, 24, 25, 26
Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979) 4, 5, 6, 7, 8, 28
Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) 4, 5, 9, 11, 12, 15, 24, 25, 28
Muskrat v. United States, 219 U.S. 346 (1911) 10
Smith v. City of Cleveland Heights, et al., 760 F.2d 720 (6th Cir. 1985), *cert. den.* ..... U.S. ..... (January 13, 1986) 4
United Airlines, Inc. v. Evans, 431 U.S. 553 (1976) 13
Zuch v. Hussey, 394 F. Supp. 1028 (E.D. Mich. 1975), *aff'd and remanded* 547 F.2d 1168 (6th Cir. 1977) 14, 24, 25

Constitution, Statutes and Rules

U.S. Const., Art. III 4, 10
U.S. Const., First Amend. 17, 23, 25, 26
Civil Rights Act of 1866, Sec. 1982 3
Title VII, Civil Rights Act of 1964, 42 U.S.C. Sec. 2000(e) et seq. 13
Title VIII, Civil Rights Act of 1968, Fair Housing Act, Sec. 801 et seq., 42 U.S.C. Sec. 3601 .....11, 12, 26, 27

Fair Housing Act, 42 U.S.C. Sec. 3604(a) 3, 11, 14, 15, 17, 18, 21, 22, 27
Fair Housing Act, 42 U.S.C. Sec. 3604(c) 3
Fair Housing Act, 42 U.S.C. Sec. 3604(d) 5
Fair Housing Act, 42 U.S.C. Sec. 3604(e) 3, 4
Fair Housing Act, 42 U.S.C. Sec. 3613 15

Fed. R. Civ. P., Rule 59(e) 3
Supreme Court Rules, Rule 17 27

No. 85-1157

In the Supreme Court of the United States

October Term, 1985

HILLTOP REALTY, INC.,
Petitioner,

vs.

CITY OF CLEVELAND HEIGHTS and
HEIGHTS COMMUNITY CONGRESS,
Respondents.

ON PETITION FOR CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported as 774 F.2d 135 and is reprinted at A1 of the Appendix by Petitioner. The Opinion of the United States District Court dated November 30, 1983 is unreported and is reprinted at A49 of the same Appendix. The Opinion of the United States District Court dated April 22, 1984, also unreported, is the Order from which the appeal to the Sixth Circuit was taken. It was omitted from Petitioner's Appendix, but is being submitted by Respondents in order to complete the record necessary for determination of the Petition.

The Respondents would ask that the Order of the United States District Court dated July 23, 1985, relating to the award of attorney fees, and which appears in the Petitioner's Appendix at A19, be stricken from that Appendix on the basis that the Order is currently on appeal to the Sixth Circuit, and is not, therefore, properly before this Court.

STATEMENT OF THE CASE

The City of Cleveland Heights ("City") is a municipal corporation organized and existing under the laws of the State of Ohio. It is surrounded by Cleveland on the west, East Cleveland and Cleveland on the north, South Euclid and University Heights on the east, and Shaker Heights on the south (M.O. 4) (A51). The City is governed by a City Council, which then elects a Mayor and appoints a professional City Manager (M.O. 4) (A51-52).

The Heights Community Congress ("HCC") is a not-for-profit, non-partisan organization organized and operating under the laws of the State of Ohio (M.O. 15) (A60). It is composed of religious, civic, educational, neighborhood, and community organizations in the Cleveland Heights/University Heights area, and it exists for the purpose of promoting and maintaining an open and integrated community (M.O. 16) (A60).

Hilltop Realty, Inc. ("Hilltop"), currently known as HGM/Hilltop, is an Ohio corporation, operating since 1953 as a real estate brokerage firm, with its principal office in Lyndhurst, Ohio (M.O. 25) (A67). At all times relevant herein, Hilltop maintained a real estate office in the City of Cleveland Heights, as well as maintaining offices in the other eastern suburbs of Cleveland (M.O. 25) (A67).

On March 7, 1979, the City and the HCC, together with six individual plaintiffs whose claims had been dismissed prior to trial, brought suit against Hilltop, its president, and five individual sales persons. The Complaint alleged various discriminatory housing practices in violation of the Fair Housing Act, 42 U.S.C. Secs. 3604(a), (c) and (e), and the Civil Rights Act of 1866, 42 U.S.C. Sec. 1982. The suit was based upon numerous varied allegations, including allegations concerning discriminatory showings, comments, advertising practices, and solicitation complaints.

The matter proceeded to trial before the Honorable William K. Thomas, United States District Court for the Northern District of Ohio, Eastern Division. Beginning on January 31, 1983, the trial proceeded for a period of some twelve weeks, the proceedings concluding on May 3, 1983, and the final arguments given on June 20, 1983.

In a 207-page Memorandum and Order ("M.O.") filed on December 7, 1983, the District Court found for Plaintiffs, holding that there were eight violations of Sec. 3604 (a), one violation of 3604(c), and one violation of 3604(e), and a finding that Hilltop had a corporate intent to not obey the Fair Housing Act, as was evidenced by the eight already found, together with four additional violations.

The City and the HCC timely filed a motion to alter and amend, pursuant to Rule 59(e), Fed. R. Civ. P. In an Order filed on May 10, 1984, the District Court amended its previous Order to award one dollar in nominal damages to the HCC, but denied the Plaintiffs' claims for injunctive relief. Memorandum and Order filed April 30, 1984, and consisting of some 33 pages, re-evaluated and made additional findings with regard to the discriminatory contacts.

Hilltop filed an appeal to the United States Court of Appeals, Sixth Circuit, with regard to the merits of the case. The City and the HCC filed an appeal with regard to the District Court's denial of injunctive relief. The Sixth Circuit Court of Appeals, on October 2, 1985, affirmed the District Court's decision in all parts except the District Court's single finding of a violation of Sec. 3604(e), which finding was reversed.

ARGUMENT

I. PLAINTIFFS ESTABLISHED THE ELEMENTS OF STANDING AT EACH STEP IN THE LITIGATION BELOW.

Standing in fair housing cases has been consistently and liberally granted to plaintiffs. Of course, the plaintiff must have suffered a "distinct and palpable" injury. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). But the injury claimed may be as abstract as a stigmatic one. *Smith v. City of Cleveland Heights, et al.*, 760 F.2d 720 (6th Cir. 1985), *cert. den.* ..... U.S. ..... (January 13, 1986).

The *Havens* case, cited by Petitioner to demonstrate that this Court is imposing greater limitations upon claims of standing, does instead approve an expansion of the definition of standing to include testers as well as *bona fide* homeseekers within the group of those able to make a claim under 42 U.S.C. Sec. 3604. Citing its decision in *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979) as the standard in fair housing cases, this Court repeated that standing is to extend ". . . to the full limits of Art. III and that the courts accordingly lack the author-

ity to create prudential barriers to standing in suits brought under that section." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982), *citing Bellwood*, 441 U.S., at 103, n.9. In *Gladstone*, the Court had found that a municipality and four individuals had standing to sue for injuries alleged to have been caused by real estate steering practices.

In *Havens*, this Court interpreted the "any person" language of 42 U.S.C. Sec. 3604(d) to include a fair housing organization, testers, and individuals suffering indirect injury because of harm to the neighborhoods in which they resided. *Havens*, 455 U.S., at 373-74, 378-79.

There is, then, no need to engage in a lengthy evaluation of non-fair housing law to create a new definition of standing. The District Court's findings and those of the Court of Appeals, Sixth Circuit, are consistent with the long line of standing cases.

Petitioner misrepresents the findings of the District Court as they describe injury to the HCC. The trial court found, and the Sixth Circuit affirmed, that the correlation between the type of discriminatory activity and the resulting harm to the HCC was of such a nature that it caused monetary injury to the HCC. However, the amount of such injury had not been established and could not, therefore, be recovered from Hilltop beyond the nominal damages award (774 F.2d, at 139) (A6).

A. The City's Standing Is Based Upon Both Real And Threatened Injury.

Petitioner's argument that the City created its own injury has no merit. *See*, Petition at p. 7. The District Court found both real and threatened injuries to the City (M.O. 197) (A198). The real injuries, and the trial court's findings about those injuries, were based primarily upon

exhibits and the testimony of City Manager Richard V. Robinson, who described the components of the City's fair housing programs and the dollar costs of each (M.O. 194-197) (A195-198). The District Court concluded that these expenditures ". . . were necessitated by the City's policy to promote a stable integrated community and to ward off the resegregation of its various neighborhoods and the City as a whole." (M.O. 197) (A198).

The District Court also found threatened injuries. Certain areas of the City were found to be resegregating (M.O. 19) (A198). After a thorough analysis of the real estate values in the Eastern suburbs the District Court concluded that the tendency toward resegregation threatens the City's tax base and its school system (M.O. 197-199) (A198-200).

This Court has already linked school segregation to housing segregation. The District Court, before analyzing the City's school data, cited the language from *Bellwood* that links school segregation to housing segregation. 441 U.S., at 111, n.24 (M.O. 199-200) (A199-200). The school system was not a plaintiff, to be sure, so relief was not requested on its behalf. But the census tract demographic findings made by the District Court and the racial figure from the schools underscored the racial isolation occurring within the City's neighborhood school boundaries and further emphasized the harm to the City's policies and programs. *See* (M.O. 199-200) (A199-200).

Hardly to be considered an "investigation," the City's proof and the District Court's findings were that the programs engaged in by the City and by the HCC were to combat the serious harm done to both of them as a result of Defendant's illegal discriminatory acts (M.O. 199-200) (A199-200).

B. The District Court Applied The Correct Standard In Deciding Standing.

Not only has Hilltop mis-described the factual findings of the District Court, but it has also incompletely stated the standing requirements set forth by this Court in *Bellwood*. The complete quotation describes some of the adverse consequences of steering practices upon a neighborhood.

> If petitioners' steering practices significantly reduce the total number of buyers in the Bellwood housing market, prices may be deflected downward. This phenomenon would be exacerbated if perceptible increases in the minority population directly attributable to racial steering precipitate an exodus of white residents.

Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979). The Court then lists other injuries, including harm to the school system, and concludes the section on the municipality's standing with the following:

> If, as alleged, petitioners' sales practices actually have begun to rob Bellwood of its racial balance and stability, the village has standing to challenge the legality of that conduct.

Id., at 111. The plain language requires that a municipality demonstrate only that by reason of Defendant's acts it is losing its racial balance and stability, not that it has become resegregated.

Hilltop also confuses the municipality's standing requirements with those set forth for individuals. *See* Petition at 9. In *Bellwood*, the injuries claimed by the individuals were based upon their residence in an area being trans-

formed from integrated to predominantly black, thereby depriving them of the benefits of living in an integrated society. 441 U.S., at 111. Only an individual claim triggers analysis of the neighborhood size. No such analysis is relevant or required when the claims are presented by an organizational plaintiff alleging harm to the goals and programs of the entire organization.

Hilltop finally attempts to bolster its argument by citing racial figures that do not appear in the District Court's findings, ignoring in the process the actual findings made by the District Court. Neither Hilltop's references to "average annual increase in black population" nor the "county-wide black percentage" has a basis in the District Court's findings. *See* Petition, at 9. The District Court's actual findings about the percentages of increase in minority population during the period from 1970 to 1980 are analyzed in detail according to census tracts. *See* (M.O. 6-10) (A53-56). The District Court concluded that focusing upon the average population figures concealed the higher non-white percentages in some census tracts, and hence the resegregation of certain areas of Cleveland Heights (M.O. 7) (A54).

C. The District Court Properly Found That The HCC Had Standing.

The District Court used the HCC's own statement of purpose as set forth in its Code of Regulations. The HCC exists for the purpose of ". . . promoting and maintaining an open and integrated community of the highest quality." (M.O. 16) (A60).

Again, Hilltop misstates the findings of the District Court relating to the injury claimed. The District Court found that the HCC was unable to connect ". . . Hilltop's

section 3604 violations to HCC's expenditure of monies for monitoring ($4,094) or the more inclusive costs of ($9,522)." (M.O. 200) (A200).

The District Court then considered whether Hilltop had "perceptively impaired' the HCC's ability to carry out its stated purpose (M.O. 202-203) (A201). The standard, derived from *Havens* is that:

> (if), as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low-and moderate-income homeseekers, there can be no question that the organization has suffered injury-in-fact.

455 U.S., at 365. Although the HCC's claim for specific dollar damages was not established, the HCC suffered a "general injury" to its programs which was sufficient for it to seek non-monetary relief (M.O. 201-02) (A202).

The Court of Appeals, when addressing the same argument, observed that:

> . . . . [t]he court's ruling on economic injury was not that HCC had suffered no such injury, but that the amount of its expenditures attributable to defendants' violation was too speculative to support a damage award.

774 F.2d 139, n.2 (A6, n.2). The Court of Appeals found that the factual findings upon which standing was based were not "clearly erroneous," that they constituted "something more than an ingenious academic exercise in the conceivable," and that both plaintiffs had ". . . alleged and proven facts sufficient to establish actual or *threatened* injury" as required by *Havens* (emphasis in original) (citations omitted) 774 F.2d 139 (A6-7).

D. This Case Meets The Article III Case Or Controversy Requirement.

Petitioner argues that the orders issued by the District Court amounted to no more than advisory opinions. But a reading of the well-settled definition of the Article III case or controversy requirement makes it apparent that this case and the orders it produced do not fit within the advisory opinion prohibition:

> By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. [The] term implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication.

Muskrat v. United States, 219 U.S. 346 (1911). A 207-page Memorandum and Order awarding to Plaintiffs a declaratory judgment and finding Defendants liable for having committed ten violations of the Fair Housing Act, supplemented by a 33-page Order awarding the HCC nominal damages, both based upon testimony of nearly 100 witnesses, recorded in 53 volumes of transcript, after a twelve-week trial to the bench, scarcely lacks regularity of proceedings or adverse parties.

Petitioner's argument must fail.

II. THE DISTRICT COURT DEFINED, AND THEN PROPERLY APPLIED, THE STANDARD OF CONTINUING VIOLATION.

Hilltop's argument about the statute of limitations must fail for several reasons. First, the fact that there

was a finding of one violation squarely within the 180-day period renders unnecessary much of the Title VII "continuing violation" standard. Second, the findings of the District Court, relating to the continuing nature of the violations and the relatedness of the discriminatory acts, is an application of the proper standard which should not be re-determined by this Court. Finally, the Title VII case upon which Hilltop places primary reliance is factually and legally irrelevant to this case.

Petitioner ignores both the body of Title VIII law dealing with the statute of limitations and the established standard for determining a continuing violation, and urges this Court to adopt a new standard based, instead, upon Title VII cases.

A. Plaintiffs Met The 180-Day Requirement By Establishing One Violation Within That Period.

To be sure, 42 U.S.C. Sec. 3612(a) contains a 180-day statute of limitations. The District Court properly found that the audit involving Hortense Johnson, an event which was within the 180-day period, constituted discrimination in violation of Sec. 3604(a) (M.O. 82-93) (A111-119). The Court of Appeals for the Sixth Circuit analyzed the Johnson audit carefully as well. 774 F.2d 139 (A8-10). After setting forth the simple *Havens* requirement that a complaint be filed within 180 days of the last asserted occurrence of that practice, the Court of Appeals concluded that:

> [D]efendants' argument that the court erred in holding that the individual violations found satisfied the continuing violation requirement amounts to nothing more than a disagreement with the District Court's view of

> the evidence in its entirety. The Court's finding on this point was not clearly erroneous.

774 F.2d 139 (A10).

It is not necessary, as Petitioner would urge this Court, to look beyond the *Havens* case in determining the appropriate standard to be used. The *Havens* case does not constitute a limitation upon the 180-day prerequisite as Petitioner suggests at page 14, but is, rather an expansion of that period. The sole violation within the 180-day period in *Havens* involved only one individual, Coles, whose claim was the subject of a consent order already entered by the District Court. 455 U.S., at 380. By the time the case reached this Court, there was then no one who stated an individual claim which fell within the 180-day period, yet, standing was granted to the remaining plaintiffs. *Id.*, at 371.

B. The District Court Properly Found That Hilltop Had Engaged In A Continuing Violation Of Title VIII.

Havens involved a pattern or practice claim. *Id.*, at 380-381, n.23. Separate injuries had been done to individual testers, who then used each other's injuries to demonstrate a continuing violation to each of them. *Id.*, at 381.

The HCC and the City had vigorously argued that they had proven a pattern and practice of discrimination by Hilltop. The District Court rejected the Plaintiffs' arguments, concluding from its factual findings that a continuing practice was present (M.O. 197) (A195-196).

C. Hilltop's Reliance Upon Title VII Case Law Is Misplaced.

The Title VII case cited by Hilltop involves a female flight attendant who had worked for United Airlines for a 15-month period between 1966 and 1968. *United Airlines, Inc. v. Evans,* 431 U.S. 553 (1976). At that time, it had been United's policy not to allow female flight attendants to be married. *Id.,* at 554. Although it was later decided, as a result of a case filed by another airline employee, that such required resignations violated Title VII, Evans had not been a party to that suit, nor was she protected under the collective bargaining agreement entered into in 1968 between United and its union, in which reinstatement of certain flight attendants was ordered. 431 U.S., at 555. Evans' only claim was that United engaged in a continuing violation for not giving her seniority rights when she was rehired in 1972. There were no attacks on the "bona fides" of the seniority system, and there was no intentional discrimination. *Id.,* at 558-559. The system, neutral in its operation, did not constitute a continuing violation.

> The statute does not foreclose attacks on the current operation of seniority systems which are subject to challenge as discriminatory. But such a challenge to a neutral system may not be predicated on the mere fact that a past event *which has no present legal significance* has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer. (emphasis added)

Id., at 560. Clearly, there was no violation that *could have* extended into any 180-day period.

Quite a different situation is presented here. There was one violation of 3604(a) found within the 180-day period (M.O. 188) (A191). There were numerous others, all with present legal significance, and not racially neutral, which occurred prior to the 180-day period (M.O. 188) (A191).

Yet, this case meets the continuing policy requirements. The District Court also found corporate intent to discriminate, a finding based upon events which began in 1976 and continued through the date of filing the Complaint (M.O. 155-160) (A167-170). That finding of corporate policy "to not obey" the Fair Housing Act is sufficient as a continuing violation to meet a challenge even under Hilltop's Title VII definition.

III. THE DISTRICT COURT BOTH APPLIED THE PROPER STANDARD AND ENGAGED IN A DETAILED FACTUAL ANALYSIS IN ORDER TO DETERMINE THAT HILLTOP VIOLATED 42 U.S.C. SECTION 3604.

The District Court began the careful 88-page analysis (occupying 72 pages in the Appendix) of the Section 3604(a) claims by setting forth the appropriate legal standards from the Fifth and Sixth Circuits. Relying upon the Sixth Circuit definition, extracted from *Zuch v. Hussey*, 394 F. Supp. 1028 (E.D. Mich. 1975), *aff'd and remanded* 547 F.2d 1168 (6th Cir. 1977), the District Court then discussed the effects/intent question common to all employment and housing cases (M.O. 26-27) (A68-69). The District Court imposed upon Plaintiffs the heavier of the two burdens, requiring in each instance that ". . . plaintiffs must show intent to racially steer." (M.O. 27) (A69). Further rounding out its definition, the District Court cited cases from the Sixth and Seventh Cir-

cuits which stand for the proposition that steering need not be successful in order to be proscribed by Sec. 3604(a), and which adopt the reasonable-person standard as the measure of the effect any statements or actions would have, as well (M.O. 27-28) (A69).

After dealing with the issue of vicarious liability, the District Court concluded its initial evaluation of the relevant legal standards with a rejection of the "pattern and practice" standard set forth by Sec. 3613 in favor of the "continuing violation" standard of *Havens*.

Hilltop's argument appears to be that the District Court created a definition apart, somehow, from the statute itself and not relevant to the statutory requirements, applied the definition to the facts, and made its findings without tying the facts to the statute itself.

Hilltop's arguments simply ignore the record. The findings for each audit are detailed and are stated in terms of the statutory and case law language. The Rust/Johnson audit, for example, makes factual findings that numerous houses were available to the white checker (M.O. 90) (A117). No houses were ever shown to the black checker Hortense Johnson, nor were any others (to replace the one owned by a black family in Cleveland Heights and found by the agent to be no longer available) even suggested to Ms. Johnson (M.O. 90) (A117). When compared to the contemporaneous treatment of the white checker, who was shown houses in four communities, the Court concluded:

> [i]t is determined, therefore, that agent Liff denied showing available homes to Mrs. Johnson on the basis of race, a violation of 3604(a). (footnote deleted)

(M.O. 90) (A117).

Yet, Hilltop twice within this section faults the District Court for engaging in "no further analysis" (Petition, at pages 18, 19). Failure to show any homes to the black, while showing many to the white, is analysis enough to show that housing was made unavailable to the black. No more exhaustive analysis of the evidence should be required of a district court than that which was done in this case. Ten pages of the Memorandum and Order were devoted to the facts of the aforementioned Rust/Johnson audit alone.

Petitioner's third argument, although couched in terms of criticism of the standard used, is, in fact, a simple disagreement with the factual conclusions which were drawn first by the District Court and affirmed by the Sixth Circuit.

Finally, it should be noted that Hilltop misstates the number of violations found by the District Court. The Order, the 207th page of the massive Memorandum and Order summarizing the violations, begins with:

> 1. Upon the findings of fact and conclusions of law heretofore made and for the reasons which have been stated, it is determined and declared:
>
> a. Defendant Hilltop Realty, Inc. has engaged in violations of 42 U.S.C. Sec. 3604(a) in the *eight* incidents specified in part II, 7b., pp. 31-114. (emphasis added)

(M.O. 207) (A205).

While it is vital for this Court to have before it accurate statements as to the factual findings made by the District Court, it is apparent that, in Hilltop's third argument, only the factual findings are being contested.

Disagreements as to factual findings are not the stuff upon which Petitions for Certiorari are properly based. Hilltop's third argument must fail.

IV. THE FIRST AMENDMENT ANALYSIS NEED NOT BE REACHED SINCE THE DISTRICT COURT BASED ITS FINDINGS UPON THE TOTAL CIRCUMSTANCES AND DID NOT LIMIT ITSELF TO THE ILLEGAL SPEECH.

The District Court engaged in a thorough analysis of each of the audits involved in the 3604(a) claims. The Court's findings, based upon *all* of the circumstances, are set forth in a section of the Memorandum and Order which exceeds 100 pages. Petitioner extracts only phrases from those circumstances and presents them as if the words alone were the basis for the findings.

A. The Violations Of Sec. 3604(a) Were Not Limited To Mere Discriminatory Statements.

Hilltop has taken seven statements and has argued that they are subject to First Amendment protection. A discussion of the actual findings made by the District Court will demonstrate that no commercial speech analysis needs to be made.

1. Patricia Pap.

The statement cited by Hilltop at page 21 is only one small part of an audit in which the District Court found discriminatory statements and showings to both the black and white checkers. The first comment made to Pap, the white checker, in the Pap/Tufts audit by sales agent Mayfield was an offensive story about a house which had been occupied by a black family and which needed

to be fumigated before the white family could move into it (M.O. 37) (A77). In conjunction with his description of one neighborhood, Mayfield commented that "it was just human nature, that owners prefer selling to whites . . . they sold to whites 80% of the time, and that was the way it should be . . . ." (M.O. 37) (A77). Agent Mayfield stated, when he was showing the Revere Road property to the white checker, that white buyers were much in demand in that neighborhood (M.O. 37) (A77). Upon leaving the Revere home, the agent indicated his own preference for the Englewood area, stating that it would never be as integrated as the Revere neighborhood (M.O. 38) (A77). These comments demonstrated Mayfield's intent to use race as one of the factors in determining appropriate showings for the white checker and in influencing her housing choices (M.O. 39) (A79).

There was also an actual denial of housing to Ms. Pap. Although the computer printouts listed houses on Chagrin, Menlow, and Caledonia, Mayfield told the white tester that she would not be interested in seeing those houses because "[t]hose neighborhoods weren't integrated any more, that they were black, and that even blacks were reluctant to buy in the neighborhood." (M.O. 38-39) (A78). Those houses were never shown to the whites.

The District Court concluded that Mayfield's statements, which diverted the white checkers from considering, or even from seeing, properties in neighborhoods which were no longer integrated, constituted making dwellings unavailable based upon race, in violation of 3604(a) (M.O. 39) (A79). The earlier statements to the white checkers, the District Court found, corroborated "Mr. Mayfield's locational steering with reference to checkers Pap and Kowalski." (M.O. 39) (A79).

2. Cheryl Porter Tufts.

The next phrase cited by Petitioner is one extracted from the second half of the Pap/Tufts audit, which audit is also analyzed in detail by the District Court (M.O. 33-34) (A74-77). The District Court made many findings with regard to this transaction. Some nine days after having asked Mayfield to show her houses in Cleveland Heights and South Euclid, Mayfield called to suggest that they see a house not in either community, but at 175th and South Miles in Cleveland (M.O. 33-34) (A75). The only other house offered to Ms. Tufts was another open house, to which Mayfield invited her after she declined his offer to see the South Miles house (M.O. 34-35) (A75). The second house was located on the Cleveland Heights/East Cleveland border, in two census tracts with black populations of 34.8% and 53.7% in 1980 (M.O. 35) (A76).

Finally, the District Court looked at the comments which had been made to Ms. Tufts, both as to what they revealed about the agent's intent and as to the part the comments played in influencing her housing choices (M.O. 35-36) (A76). After considering the showings, the reluctant service, the comments, and the agent's intent, the District Court concluded:

> These statements of Mr. Mayfield, considered together with the showings, are deemed to have been made by Mr. Mayfield to influence the housing choices of Ms. Tufts. Therefore, it is concluded that in violation of section 3604(a), Mr. Mayfield racially steered Ms. Tufts toward both a predominantly black area outside of Cleveland Heights and to a more integrated area within Cleveland Heights.

(M.O. 36) (A76-77). Petitioner's claim clearly ignores the numerous findings relating to *all* circumstances of that audit.

3. Patricia Pap.

The third finding cited by Hilltop as a separate violation is actually just one more of the remarks made to the white checker, Patricia Pap, in section 1 above and is simply another part of the evidence considered by the District Court in making its findings of discrimination toward Patricia Pap. *See* (M.O. 37-39) (A77-79).

4. Linda Blaser.

With Linda Blaser, Petitioner once again focuses only upon a phrase and ignores findings of discriminatory showings (M.O. 50) (A87). Again, the trial court's analysis is a detailed one. The District Court found that Blaser, a white checker conducting an audit of Hilltop's Cleveland Heights office, was shown houses only outside of Cleveland Heights (M.O. 50) (A86-87). Despite Mayfield's encouragement to look in Cleveland Heights, he showed her homes only in Lyndhurst and drove by a house in South Euclid (M.O. 50) (A87). The District Court concluded that:

> [s]ince he showed her no homes in Cleveland Heights, the encouragement to look in Cleveland Heights was only talk.

(M.O. 50) (A87).

The Court then looked to the comment made by Mayfield. As it was found by the District Court, the complete comment made to the white checker is as follows:

> You probably won't want your kids to go to East Cleveland schools. They are mostly black but some white home buyers are buying there for the lower prices.

(M.O. 50) (A87). The Court concluded that since the area in question is in a part of Cleveland Heights which is contained within the East Cleveland school system,

> . . . the remark, stressing the "mostly black" character of East Cleveland's schools, would tend to disparage living in the portion of the City which comprises the Caledonia school district.

(M.O. 51) (A87). The conclusion of the District Court is set forth next in the Memorandum and Order. Even the conclusion makes reference to both the showings and the remark:

> As a sales agent in the Heights-Hilltop office, Mr. Mayfield's making of this remark and his showing of houses only outside of Cleveland Heights, even though she had asked for the Heights-Hillcrest area, which includes Cleveland Heights, persuades this court that Mr. Mayfield racially steered Mrs. Blaser away from Cleveland Heights in violation of 3604(a).

(M.O. 51) (A87-88).

5. Jerome Emoff.

A fifth Hilltop misrepresentation concerns the comments and the circumstances of the findings made by the District Court as they related to homebuyer Jerome Emoff. *See* (M.O. 99-100) (A124-125). In this situation, the comment was the beginning of the analysis by the District Court. The remark was made about the Forest Hills area while Mr. Emoff and the sales agent Delores Russo were driving through that area. (M.O. 99) (A124). The Court concluded that such a comment to a reasonable homebuyer was an attempt to influence the housing choices on the basis of race and was, hence, a violation of Section 3604(a) (M.O. 100) (A125).

6. Joseph and Mary Calabrese.

The sixth reference by Petitioner is also to a comment made by a Hilltop agent without a discussion about the other discriminatory events surrounding the making of the comment. *See* (M.O. 101-107) (A125-130). After having specifically requested to see houses in Cleveland Heights, no houses meeting the homeseekers' requirements were shown to them in that City (M.O. 102) (A126). Mrs. Calabrese selected some homes from a multiple listing book and asked to see them, but, each time, she was told that the particular house had been sold (M.O. 102-103) (A126-127). The agent, when confronted with the question as to why the Calabreses were not being shown Cleveland Heights, Shaker Heights and University Heights, responded with the question, "[H]ow do you feel about blacks, specifically?" and elaborated on the question (M.O. 102) (A127). Coupled with the agent's adamant refusal to show the City even when directly asked by both of the Calabreses to do so, the District Court concluded that the remark had further demonstrated a violation of Section 3604(a).

> Both the nature of his statement and his failure to show the Calabreses homes in Cleveland Heights that met their specifications establish racial steering in violation of section 3604(a).

(M.O. 106-107) (A130).

7. Howard Gordon and Belita Tisder Gordon.

The final paragraph in subsection 1 of Petitioner's Part IV contains a callous minimization of the remark made to the Gordons and found by the District Court to be a part of the act of discrimination against them. *See*

(M.O. 107-114) (A130-135). The Gordons, a bi-racial couple with five children from Mrs. Gordon's previous marriage, had specifically sought a home in Lyndhurst (M.O. 107) (A130). In direct response to Mrs. Gordon's request, Agent Francis first told a story about violence to a high school child and followed it with comments that Mr. Gordon, a white, would not be welcome to discuss the problems of his black children with school officials (M.O. 108-109) (A130-131).

Petitioner claims that this statement, like the others previously discussed, did not deny ". . . purchasers the opportunity to purchase homes in the area in question." Petition, at p. 22. Mrs. Gordon stated that the comments caused her to be "worried." (M.O. 108) (A131). Agent Francis did not show the Gordons even a single house in Lyndhurst, and their interest in the community understandably cooled (M.O. 108-110) (A131-132).

The District Court included this evidence as part of its findings that Hilltop had corporate intent "to not obey" the Fair Housing Act (M.O. 114) (A135).

B. The District Court's Findings Are Consistent With The Correct Standards Used To Analyze First Amendment Protection Of Commercial Speech.

In order to prevail in a claim that commercial speech is protected by the First Amendment, the party claiming such protection must prevail in the analysis required by *Central Hudson Gas & Electric Corp. v. Public Services Commission of New York*, 447 U.S. 557 (1980). However, before the party seeking protection may invoke the full analysis of *Central Hudson Gas*, he must meet his initial burden of demonstrating that the commercial speech was

neither misleading nor related to unlawful activity. This Court has stated:

> . . . there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity. (citations omitted)

Id., at 563-564.

The Petitioner in the present case asserts that the Supreme Court has never determined what statements constitute steering (Petition, at 20). In addition to ignoring the fact that the Court had looked to all of the circumstances of each episode, of which circumstances the comments were only a part, it ignores the definitions actually applied by the District Court. The District Court relied in part on the definition of steering set forth in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 366, n.1 (1982), as follows:

> . . . [a] practice by which real estate brokers and agents pressure and encourage patterns of racial segregation in available housing by steering members of racial and ethnic groups to buildings occupied primarily by members of such racial and ethnic groups and away from buildings and neighborhoods inhabited primarily by members of other races or groups.

The District Court further relied on the authority of *Zuch v. Hussey*, 394 F. Supp. 1028 (E.D. Mich. 1975), *aff'd and remanded* 547 F.2d 1168 (6th Cir. 1977), in which unlawful racial steering was defined as:

> . . . the use of a word or phrase or action by a real estate broker or salesperson which is intended to

> influence the choice of a prospective property buyer on a racial basis.

Zuch, 394 F. Supp., at 1047. Clearly, a "practice," as defined in *Havens*, includes the spoken word as defined in *Zuch*, as well as including the other actions.

The Petitioner, thus, may not invoke the *Central Hudson Gas* analysis because the Petitioner has failed to meet the threshold requirement of that case, stated as follows:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading.

447 U.S., at 566.

1. No constitutional protection attaches to speech that is false, misleading, or unlawful.

The Petitioner asserts that commercial speech is illegal only if it is used to promote the purchase of illegal items or the investment in illegal activities. To support this proposition, the Petitioner relies on *Casbah, Inc. v. Thone*, 651 F.2d 551 (8th Cir. 1981), *cert. den.* 455 U.S. 1005 (1982), a case which dealt with a state statute prohibiting advertising that promotes the sale of "drug paraphernalia." A careful reading of *Casbah* reveals that this case stands for the proposition that: "Commercial speech which promotes an illegal activity may be restricted without subjecting the restriction to scrutiny under a balancing test." *Id.*, at 564. It is only outside of the commercial speech context that speech advocating a violation of the law may be proscribed by showing that the speech is directed to inciting or producing imminent lawless action.

cf. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Petitioner has characterized the speech of its agents as commercial. Therefore, the *Brandenburg* test does not apply. Rather, an intermediate level of constitutional scrutiny comes into play, and then only upon a showing that the speech was lawful in the first place.

The Petitioner alleges that the disputed statements and solicitations were made for the purpose of selling homes (Petition, at 21). While statements made for such a purpose are not unlawful under any standard, these self-same statements are unlawful when the purpose is not only to sell a home but to sell a home based on racial considerations in violation of the Fair Housing Act. The District Court, upon a painstaking examination of the evidence, found that the Petitioner had engaged in ten Fair Housing Act violations (A191, n.101). While no determination as to the falsity or misleading character of the Petitioner's statements was made, the District Court did find them to be unlawful. As stated above, unlawful speech is not entitled to the protection of the First Amendment.

2. Even if the Petitioner established that its speech was lawful, the Petitioner cannot succeed under the analysis of Central Hudson Gas.

Once the Petitioner meets his initial burden of showing that his speech is lawful and thus entitled to protection under the First Amendment, the Court will apply the remaining analysis which requires the State to show:

a. a substantial interest to be achieved by restrictions on commercial speech;

b. the limitation on speech is designed to achieve the State's interest; and

c. the limitation is not more extensive than is necessary to achieve the State's interest.

3. The substantial government interest is set forth in Title VIII itself.

Once again, Hilltop has set up a tin man, has misrepresented it to possess a heartbeat, and then has criticized the court for not giving it Cardio Pulmonary Resuscitation. It strains one's credibility to accept the Petitioner's implicit assertion that the Fair Housing Act is not the embodiment of a substantial governmental interest. Asserting without needless argument that the Fair Housing Act is a substantial governmental interest, one need only examine the requirements of the statute to see that the limitations on speech contained therein are designed to achieve the State's interest.

Petitioner's assertion seems to be a dual one: first, a back-door attempt to argue that Section 3604(a) is unconstitutional as it relates to speech; and second, that sales agents are providing a valuable service by frightening customers into making housing choices in same-race neighborhoods.

V. PETITIONER FAILS TO DEMONSTRATE SPECIAL AND IMPORTANT REASONS WHY A WRIT OF CERTIORARI SHOULD ISSUE.

Rule 17, Supreme Court Rules, states that only "special and important" reasons will dictate the granting of a Writ of Certiorari. The resolution of a conflict between or among the federal courts of appeals will require granting a Writ, as will correcting a decision which might conflict with prior holdings of this Court. Rule 17, Supreme Court Rules.

Petitioner does not even allege that the holding of the Sixth Circuit conflicts with those of other federal courts of appeals. Nor does Petitioner cite to applicable earlier holdings of this Court to show an erroneous application by the Sixth Circuit. Petitioner simply argues that the Sixth Circuit was wrong, as the District Court had been earlier.

CONCLUSION

Respondents request this Honorable Court to deny the Petition for a Writ of Certiorari because Petitioner has not identified any special and important reasons why a Writ should issue. The Court of Appeals correctly applied this Court's opinions interpreting both standing requirements and the Fair Housing Act itself, including *Gladstone, Realtors v. Village of Bellwood* and *Havens Realty Corp., et al. v. Coleman, et al.*

Respectfully submitted,

DONALD K. BARCLAY, *Director of Law*
City of Cleveland Heights
Counsel of Record
KATHRYN GONSER ELOFF, *Assistant Law Director*
City of Cleveland Heights
2953 Mayfield Road
Cleveland Heights, Ohio 44118
Phone: (216) 371-6660
Attorneys for Respondent City of Cleveland Heights

AVERY S. FRIEDMAN
701 Citizens Building
Cleveland, Ohio 44114
Phone: (216) 621-9282
Attorney for Respondent Heights Community Congress

APPENDIX

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed May 10, 1984)

No. C79-422

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

HEIGHTS COMMUNITY CONGRESS, *et al.*,
Plaintiffs,
v.
HILLTOP REALTY, INC., *et al.*,
Defendants.

ORDER

THOMAS, *Senior Judge*

The court, having filed its memorandum and order granting plaintiff Heights Community Congress' (HCC) Rule 59(e) motion to amend and modify judgment to grant HCC One Dollar ($1.00) as nominal damages, and denying the Rule 59(e) motion of plaintiffs HCC and City of Cleveland Heights to amend and modify judgment to grant injunctive relief (prohibitory and affirmative) against defendants Hilltop Realty and Bruce Johanns, therefore, pursuant to Rule 58, Federal Rules of Civil Procedure,

IT IS ORDERED that the judgment is amended and modified, and One Dollar ($1.00) nominal damages is awarded Heights Community Congress against the defendant Hilltop Realty, Inc.

IT IS FURTHER ORDERED that the Rule 59(e) request of plaintiffs Heights Community Congress and City of Cleveland Heights for amendment and modification of the court's judgment to include injunctive relief (prohibitory and affirmative) against the defendants Hilltop Realty and Bruce Johanns is denied.

Further, IT IS DECLARED that this court's jurisdiction and authority under 28 U.S.C. §2202 is continuing.

IT IS SO ORDERED.

/s/ WILLIAM K. THOMAS
U.S. District Senior Judge

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed April 30, 1984)

No. C79-422

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

HEIGHTS COMMUNTY CONGRESS, *et al.*,
Plaintiffs,

v.

HILLTOP REALTY, INC., *et al.*,
Defendants.

MEMORANDUM AND ORDER

THOMAS, *Senior Judge*

In this action, based on the Fair Housing Act, 42 U.S.C. §3601, *et seq.*, plaintiffs Heights Community Congress (HCC) and the City of Cleveland Heights (City) on December 7, 1983, were granted a declaratory judgment against defendants Hilltop Realty and Hilltop agent Bruce Johanns. However, the court concluded that considerations itemized in the "Relief" section of its memorandum and order of November 30, 1983 (hereinafter "opinion") "militate[d] against the issuance of an injunction."

Plaintiffs now move pursuant to Fed.R.Civ.P. 59(e) to "enter an Order granting injunctive and related affirma-

tive equitable relief and further granting to plaintiff Heights Community Congress monetary relief. . . ." Opposing plaintiffs' reconsideration motion, defendants Hilltop and Mr. Johanns assert that "the reasons advanced by plaintiffs do not justify the Court modifying its Order in this case." Subsequently, the court granted the United States' motion to file an amicus curiae brief "in support of the [plaintiffs'] motion . . . to amend the judgment in this case to provide for injunctive relief prohibiting defendant Hilltop Realty from engaging in future unlawful conduct." The government stated, "we take no position concerning the appropriateness of ordering equitable relief beyond a prohibitory injunction."

Should the court determine on reconsideration that the plaintiffs are entitled to injunctive relief, the court is empowered under Fed.R.Civ.P. 59(e) "to alter or amend the judgment."[1] In part I the court sketches the background against which the motion need be considered and then takes up the request of Heights Community Congress (HCC) that nominal damages be awarded HCC. Other alteration motion claims are considered in subsequent parts.

I.

In the section of the opinion entitled "Section 3604 (a): Summary and Conclusions," pp. 155-160, with respect to eight identified incidents this court determined and declared that Hilltop engaged in violations of section

---

1. In cases tried with or without a jury, Rule 59(e) authorizes a court to alter or amend the judgment when a motion is "served not later than 10 days after entry of judgment." Referring to such a motion, *Huff v. Metropolitan Life Ins. Co.*, 675 F.2d 119, 122 (6th Cir. 1982), observes that "[t]he grant or denial of a Rule 59(e) motion is within the informed discretion of the district court, reversible only for abuse."

3604(a). This section prohibits "making unavailable a dwelling because of race."[2] With reference to agent Johanns' postcard solicitations of sales in August and November 1978 the court also determined and declared that defendants Hilltop and Johanns violated section 3604(e). This subsection prohibits solicitation of housing sales based on race.

In *Marr v. Rife*, 503 F.2d 735 (6th Cir. 1974) (first appeal), 545 F.2d 554 (6th Cir. 1976) (second appeal), the Marrs, a black couple, charged that based on race four defendants refused to sell a house, in violation of the Fair Housing Act. Five days later the house was sold to the Marrs. The district court found a fair housing violation against Arntz, one of four defendants. An agent of Rife Realty Agency, Arntz misrepresented that the house was unavailable. The district court refused to find Rife and the other two defendants responsible. Finding error, the court of appeals concluded that Rife, the broker, was liable for the acts of Arntz, the sales agent.

Applying *Marr v. Rife*, 503 F.2d at 742, this court imputed to defendant Hilltop the acts or statements of Hilltop's agents in the eight section 3604(a) violations, (agent Mayfield in four violations and four other agents in the remaining four violations). These violations were found to have impacted on Cleveland Heights, causing distinct and palpable injury and threating further injury to the City. Further applying *Marr v. Rife*, it was determined that Bruce Johanns' acts as a Hilltop sales agent in violating section 3604(e) were imputed to Hilltop. The court

---

2. The court found that one of the section 3604(a) violations was also a section 3604(c) violation. That section makes it illegal to make statements "with respect of the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race. . . ."

found that there was no evidence that any homeowner contacted Bruce Johanns to put up a house for sale. Nevertheless, the court found that since the City "expended money to enforce the City's anti-solicitation ordinance against him, Bruce Johanns' violation of the ordinance caused a distinct and palpable injury to the City."

The findings relating to HCC are considered in conjunction with plaintiff HCC's assertion that it "is entitled to the recovery of at least nominal damages" as relief from the denial of fair housing rights by defendant Hilltop. Hilltop opposes the request stating there is "no authority which holds that organizations are entitled to nominal damages in fair housing cases."

Section 812 of the Fair Housing Act, 42 U.S.C. § 3612 entitled "Enforcement by private persons," states in part:

> (c) The court may grant as relief, as it deems appropriate, . . . and may award to the plaintiff actual damages and not more than $1,000 punitive damages.
>
> . . .

In the court's opinion, HCC was denied "monetary damages," i.e. "actual" damages, because HCC failed to establish that expenditures in carrying on its various activities to maintain an open and integrated community "were directly caused by violations of the Fair Housing Act by either defendant Hilltop or the other defendants." In this analysis of whether "actual" damages had been proved, this court did not address HCC's entitlement to nominal damages.

In plaintiffs' second appeal in *Marr v. Rife*, the Sixth Circuit upheld the trial court's "determination of minimal compensatory damages" as "not clearly erroneous." 545 F.2d at 555. The court of appeals agreed with the district

court that "plaintiffs' tender of evidence to prove resulting damages from the misrepresentation was speculative." *Id.* While not characterizing the affirmed $1 compensatory damages as nominal damages, it is plain that the court of appeals has thus approved nominal damages in a fair housing action when resulting "actual damages" are speculative and unproved. Clearly, the district court's finding of damages, affirmed by the court of appeals, meets the definition of nominal damages. Nominal damages are defined in 22 Am Jur 2d, Damages § 5, at 20 (1965), as "either those damages recoverable where a legal right is to be vindicated against an invasion that has produced no actual present loss of any kind or where, from the nature of the case, some compensable injury has been shown but the amount of the injury has not been proved."

Jordan v. Dellway Villa of Tennessee Ltd., 661 F.2d 588 (6th Cir. 1981), relied on by the plaintiffs, noted that under *Carey v. Piphus*, 435 U.S. 247, 266 (1978), when "actual damages are not present, the victims of due process violations are still entitled to nominal recovery." In an action brought for a class of tenant applicants for suites in an apartment complex the district court found that the defendant owners and managers violated the Fair Housing Act and 42 U.S.C. § 1982. Also, the court specified a class of persons who were injured by the violation. The court of appeals ruled that the district court too narrowly limited the class of those entitled to recovery. Recognizing that it was essential to show that "race played a role in the rejection of applications filed by the individual claimants," the court of appeals concluded that the test applied by the district court was "irrelevant." The court of appeals held that "[t]he critical issue in determining eligibility for recovery of damages in this case

[and nominal damages were approved] is whether an individual applicant was actually discriminated against by the defendants, not whether an individual applicant would have been able to rent an apartment at Dellway Villa if all applications had been processed fairly." Thus, this Sixth Circuit case upholds the entitlement of individuals to nominal damages in a fair housing case, but, as defendants note, the case does not deal with an organization's claim of damages in such a setting.

Because HCC expended funds necessary to finance monitoring activities to carry out its policy of maintaining Cleveland Heights as an open and integrated community, this court found that HCC suffered a type of general injury, "sufficient to permit HCC to join with Cleveland Heights in seeking injunctive relief or declaratory relief." This general injury represents an invasion of HCC's legal right to engage in its open housing monitoring activities. Its expenditure of funds to maintain these activities constitutes a nexus to race which brings HCC's general injury and claim for nominal damages within the proscriptions of the Fair Housing Act. Allowance of nominal damages to HCC comports with the principle that "[t]he law infers some damage from . . . the invasion of a right", and that "every injury from its very nature legally imports damage." 22 AmJur 2d, Damages § 5, at 20. Hence it is determined that $1, as nominal damages, should be and is awarded to HCC.[3]

---

3. Note 109 of the court's opinion observed that "[w]hatever claims for damages under the Fair Housing Act an organization may have are governed by *Havens Realty Corp.* [*v. Coleman*], 441 U.S. 378, 379." Applying *Havens*, this court determined that HCC suffered "general injury," and it is now decided that for this "general injury" HCC is entitled to be awarded $1 in nominal damages.

II.

A.

Plaintiffs argue that "Hilltop's corporate intent not to obey the Fair Housing Act compels the need for a permanent injunction and appropriate limited affirmative relief." Plaintiffs refer to this court's findings that "[t]he eight incidents of making a dwelling unavailable because of race, committed by Hilltop agents, were not isolated incidents" and that their occurrence in "successive years of 1976, 1977 and 1978 demonstrate, as found in II D, a corporate intent to continue to violate section 3604(a)." Particularizing this finding, this court stated:

> That corporate intent involves the corporation's 1977 knowledge of racial statements which John Mayfield made in 1976 and for which he was neither reprimanded nor warned by management. That corporate knowledge paralleled in time John Mayfield's four acts of racial steering during the years of 1976, 1977 and 1978.

In "Section 3604(a): Summary and Conclusions," this court ruled that "the findings of these eight violations are determined to constitute *prima facie* evidence of Hilltop Realty's continuing practice of making a dwelling unavailable because of race" and that the four instances of homeowner witnesses in which the conduct of Hilltop agents showed no violations of section 3604(a) did not rebut the *prima facie* proof. Hence, the court found that defendant Hilltop engaged in eight violations of section 3604(a) and that these eight violations constituted a continuing violation of section 3604(a).

The finding that the eight incidents of section 3604(a) violations "were not isolated incidents" rested principally

on John Mayfield's "four acts of racial steering during the years of 1976, 1977 and 1978" and corporate knowledge of racial statements which John Mayfield made in 1976 which paralleled these four acts of racial steering. These findings supported and justified the court's conclusion that the eight violations constituted "a continuing violation of section 3604(a) 'manifested in a number of incidents.' *Havens*, 455 U.S. 381." Without the four violations of John Mayfield in the years 1976, 1977 and 1978, there would have been no basis for the court's determination of "a continuing violation." Consequently, in applying the 180-day limitations period of section 3612(a), John Mayfield's four violations saved a dismissal of seven of the eight incidents. Only the B(10) Johnson-Liff steering incident would have survived section 3612(a)'s statute of limitations.

When the court took up the subject of "Relief" in part VI of the opinion, a material factor in denying injunctive relief related to the departure of John Mayfield from the company. There, it was observed:

> Notably, John Mayfield, whose conduct was found to constitute racial steering in four of the incidents, left the company in early 1979 before this action was filed.

In addition, the court noted that "[o]ther agents who were involved in some of the incidents, are no longer with the company." Indeed, agent Elayne Liff, no longer with the company, was the agent whose failure to show "available homes to Mrs. Johnson on the basis of race, a violation of section 3604(a)," constituted the single incident that occurred within the 180-day limitations period. The court's original findings relating to the eight incidents, as here amplified, do not show, as the plaintiffs were required to prove, that Hilltop is likely to continue to violate section 3604(a) in the future.

B.

The United States notes that it was "previously engaged in litigation with Hilltop involving allegations of discriminatory conduct similar to those at issue in the present case, *United States v. Exclusive Multiple Exchange, et al.*, civil action No. C70-969," and that a consent decree was entered therein on October 26, 1973. In a pre-trial order, this court excluded "evidence of alleged violations of the 1973-76 consent decree" (see note 1, opinion at page 2). Nevertheless, the court takes judicial notice that, among other things, the consent decree contained a denial by the 12 defendant real estate companies (including Hilltop) that they had violated "provisions of any federal law." The parties agreed to settle the case through the entry of the consent order, in which the 12 defendants were permanently enjoined, among other things, from "denying or otherwise making any dwelling unavailable to any person on account of race, color, religion or national origin." The United States notes that "the practices found by the Court to violate the Fair Housing Act commenced at least as early as August 1976, two months before our consent decree terminated."

Since each defendant real estate company denied that it had violated any federal law, the execution of the consent decree does not constitute evidence that Hilltop had historically discriminated by "making any dwelling unavailable to any person on account of race [or] color." It is correct that during the three year life of the consent injunction John Mayfield committed the August, 1976, Section 3604(a) violations (the Pap-Tufts audits). Apparently neither HCC nor the United States brought these incidents to the attention of the judge who entered the consent injunction and he made no findings with reference to these matters. Hence, no inference of historic discrim-

ination by Hilltop may be drawn from the occurrence of these two incidents during the life of the consent injunction.

C.

In its opinion, at p. 194, the court determined that "Hilltop's section 3604(a) continuing violation and its section 3604(e) violation . . . have caused distinct and palpable injury and has threatened further injury to the City." Each of the eight identified incidents, opinion at pp. 155-160 (herein also called racial steering or steering), involved the showing of dwellings in the City of Cleveland Heights. Because the plaintiffs in this suit are the City of Cleveland Heights and the Heights Community Congress it was decided that this territorial limitation was essential in determining liability. But in reconsidering the plaintiffs' request that this court order injunctive relief, that limitation of territory need not apply.

By now asserting that the court found "12 intentional acts of racial steering," plaintiffs are saying, in effect, that in determining whether Hilltop is likely to violate the Fair Housing Act in the future, the court should consider every incident of racial steering committed by a Hilltop sales agent without respect to whether the incident involved property in Cleveland Heights or in some other community. The United States similarly contends that in "considering whether to grant an injunction, this court has artificially restricted the evidence of violations to those affecting Cleveland Heights alone, although the company does business in other parts of Cleveland's eastern suburbs as well." There is merit in these contentions. Therefore, in reconsidering whether this court's judgment should be altered to incorporate injunctive relief, the court is considering all incidents of steering or non-steering

involving Hilltop sales agents that have been the subject of evidence received at trial.

In its reconsideration of its denial of injunctive relief, widened to all instances of steering or non-steering in the evidence, the counting of these incidents necessarily differs from the court's previous computation of the number of incidents in the opinion (pp. 159 and 205). The court adheres to the findings and conclusions throughout its opinion, reserving only as to those findings and conclusions which relate to the final issue of "relief."

The court herewith presents in tabular form steering and non-steering incidents as found in the evidence. The table includes the experiences of 24 checkers and four homebuyers introduced by plaintiffs. It also includes the experiences of four homeowner witnesses called by the defendants, determined at pp. 146-155 of the opinion not to be steering incidents. Not included on the chart are the experiences of the other homeowner witnesses called by the defendants. They are considered for any effect on the injunctive relief issue in part II D, *infra*.

Opinion Section	Checker or Prospective Homeowner	Agent	Steering	No Steering
II.B.(1)	Spagnolo	Weir		X
B.(1)	Kuzma	Weir		X
B.(2)	Tufts	Mayfield	X	
B.(2)	Pap-Kowaleski	Mayfield	X	
B.(3)	McGee	Mayfield	X	
B.(3)	Butterfield	Mayfield	X	
B.(4)	Embry	Howard		X
B.(4)	Caron	Howard-Mayfield		X

B.(5)	Perry	Williams		X
B.(5)	Blaser	Mayfield	X	
B.(6)	Blaser	Costello		X
B.(6)	Perry	Weir	X	
B.(7)	Bartoo	Hott		X
B.(7)	Drake	Gilmore		X
B.(8)	Newsom	Lee	X	
B.(8)	Horrigan	Mayfield		X
B.(9)	Jones	Gardner		X
B.(9)	Radgowski	Gardner		X
B.(10)	Rust	Gardner-Booher		X
B.(10)	Johnson	Liff	X	
B.(11)	Riggs	Bernstein		X
B.(11)	Butterfield	Bernstein		X
B.(12)	Emoff	Russo	X	
B.(13)	Calabrese	Abbott	X	
B.(14)	Gordons	Francis	X	
D.(1)	Davis	Strithof	X	
D.(1)	Wayman	Fee		X
D.(1)	Clark	Strithof	X	
E.	Raitz	Russo		X
E.	Young	Hott		X
E.	Robinson	Fallon		X
E.	Markon	Seith		X

The chart reflects 13 steering incidents and 19 no steering incidents. Fourteen different agents were involved in the 19 incidents of no steering. Eight steering incidents, four of which involved agent Mayfield, have been discussed *supra* at pp. 7-9 [A9-A10]. Of the five additional steering incidents, one involved agent Mayfield, one involved agent Leo Lee, one involved agent Steven Paul Francis, and two involved agent Angela Strithof. As seen,

agent Mayfield has not been with Hilltop since 1979, and agent Leo Lee left Hilltop in 1982.[4]

By a remark to prospective home buyers Belita and Howard Gordon; an interracial couple, agent Steven Paul Francis was found to have racially steered the Gordons away from Lyndhurst. However, the court further found that he showed the Gordons 45 to 60 homes in several communities, including South Euclid, the location of the Miramar Boulevard home they contracted to buy; and that these showings refuted any claim that Mr. Francis attempted to steer the Gordons into Cleveland Heights. Further findings were made with reference to Mr. Francis in his dealings with homeowner witnesses who were called by the defendants. As detailed in the opinion at 151 n. 78, Mr. Francis showed homes to Mr. Hall "all over Cleveland Heights." When Mrs. Hall asked whether the neighborhood was racially integrated, he "arranged for the Halls to meet their immediate neighbors, a biracial couple."

---

4. Plaintiff cites *Harrison v. Otto G. Heinzeroth Mortgage Co.*, 430 F.Supp 893 (N.D.Oh. 1977), to support the proposition that injunctive relief is appropriate in this case against Hilltop. In prescribing a remedy for two Fair Housing Act violations committed by an employee and imputed to the employer company, the court in *Heinzeroth* stated:

> [A]s a whole it seems to the court that since the defendant Haugh has left the employ of the other defendants, there is no need for a prohibitory injunction as prayed for against them. The evidence is clear that they never did any of the things complained of, except vicariously through Haugh's actions. However, a prohibitory injunction will be granted as prayed for against the defendant Haugh.

Id. at 897. Plaintiffs improperly read this case to support this court issuing an injunction against the company. In the present case, Hilltop agents responsible for five of the eight steering violations and two of the five steering incidents found not to be violations, are no longer with Hilltop. Though all of the offenders have not left Hilltop as in *Heinzeroth*, the principal offender and other offenders are gone. It has been explained why the conduct of those offenders who remain do not warrant injunctive relief.

When prospective homeowner Hoffer asked about the racial stability of the Berkeley Road neighborhood, Mr. Francis described the area as a "stable, integrated area." Considering Mr. Francis' conduct with respect not only to the Gordons, but towards Mr. and Mrs. Hall, Mr. Hoffer and Mr. Peko, the three prospective homeowners who bought in Cleveland Heights through him, it is concluded that it is not likely that he would engage in further activity in violation of section 3604(a).

In reconsidering the injunctive relief issue, the court also includes the two steering incidents involving agent Strithof of the Euclid office of Hilltop. These occurred in June 1978. There is no evidence of activity of Mrs. Strithof since that time. Hence, there is no basis on which to decide whether or not agent Strithof is likely to engage in further steering incidents.

D.

In the court's findings, only the experiences of four of the twenty-two homeowner witnesses called by the defendants were used in determining whether the eight violations of section 3604(a), proved by the plaintiffs, were rebutted. However, in this reconsideration of the question of injunctive relief the court is considering all incidents of steering or non-steering involving a Hilltop sales agent that have been the subject of evidence received at trial. Hence the experiences of the remaining homeowner witnesses are relevant.[5] This broader perspective helps the

5. At p. 14 [A15-A16], *supra*, the court has discussed three homeowner witnesses called by the defendants who bought homes through agent Francis, i.e. Hall, Hoffer and Peko. These homeowners are not further identified or discussed in this section. In the chart, *supra* at 12 [A13-A14], the court included the ex-

(Continued on following page)

court determine "the character of past violations" and whether it is Hilltop's "bona fide intention . . . to presently comply with the law," both important factors to consider in determining whether an injunction should be issued. *United States v. Warwick Mobile Homes Estates*, 558 F.2d 194, 197 (4th Cir. 1977). The court now considers 16 instances relating to these homeowner witnesses.

Agent Mayfield, who was found to have steered on five occasions, sold homes to defendants' homeowner witnesses Sterling, Von Sehrwald and Mays. Mr. Mays, a black, and Mr. Von Sehrwald, a white, both asked for and were shown homes in Cleveland Heights. Both bought in Cleveland Heights. Mr. Sterling, a black, also requested to be shown homes in Cleveland Heights. However, since he wanted a split level home, Mr. Mayfield suggested that Mr. Sterling look in less integrated Lyndhurst where there were many more split levels. Mr. Sterling refused to be shown Lyndhurst, and eventually bought in Cleveland Heights. Mr. Mayfield's effort to show a black buyer a home in a predominantly white community though the latter asked for a more integrated community does not exculpate the former's previously determined acts of racial steering. But Mr. Mayfield's act of not steering black prospective home owners Sterling, Von Sehrwald and Mays, and his non-steering of two of plaintiffs' checkers shown in the chart, are included with all other acts of Hilltop agents disclosed in the evidence in reconsidering the likelihood of Hilltop engaging in future violations of the Fair Housing Act.

Footnote continued—

periences of four other homeowner witnesses (Raitz, Young, Robinson and Markon) referred to at 146-155 of the opinion. Except for Raitz, discussed *infra* at 17 [A18], these four homeowners are not mentioned hereafter in this section. Thus, this section considers the experiences of 16 of the 22 homeowner witnesses called by the plaintiffs.

Delores Russo was also one of the five agents involved in the eight incidents discussed *supra* at 8 [A7-A8]. In its opinion, the court found that agent Russo violated section 3604(a) when she attempted to influence the housing choice of white prospective homebuyer Emoff, plaintiffs' witness, by telling him that an area in Cleveland Heights was more than one half black. Contemporaneously with this incident, agent Russo showed homes to defendants' white homeowner witness Ruth M. Raitz. In its opinion, this court found that agent Russo "suggested Cleveland Heights to Ms. Raitz" and picked out two homes in Cleveland Heights, one of which Ms. Raitz purchased. Agent Russo told Ms. Raitz that Cleveland Heights might have property that Ms. Raitz "would be able to better afford . . . and might have more of the things [she] wanted." These findings along with her showing white homeowner witness Dorothy Landis homes in Cleveland Heights indicate the unlikelihood that agent Russo had any aversion to Cleveland Heights that would cause her in the future to steer prospective white buyers from Cleveland Heights.

Agent Leo Lee, who was found to have steered black checker Newsom into a predominantly black area of Beachwood, sold a Cleveland Heights home to white homebuyer Gerald Artl in May, 1977. Mr. Artl had requested Cleveland Heights, University Heights and South Euclid. Agent Lee showed Mr. Artl homes first in well integrated Cleveland Heights. The home Mr. Artl bought was situated between the homes of a black family and a white family. This instance, devoid of racial steering, is included in the totality of acts of Hilltop agents in reconsidering the injunctive relief issue.

Hilltop agent Evelyn Gardner sold homes to homeowner witnesses Ella Mae Harris (a black) and Ellis Mas-

careno (a hispanic). Ms. Harris contacted agent Gardner in 1981 without any predisposition except to see homes in the eastern suburbs. Ms. Gardner showed her homes in areas such as South Euclid and Richmond Heights, predominantly white areas. Ms. Harris bought a home in South Euclid. Consistent with her conduct in the three incidents introduced into evidence by plaintiffs, agent Gardner did not engage in steering Ms. Harris.[6] This black homeowner's experience with a Hilltop agent was not deemed relevant to the liability issue because it occurred in June, 1981, after the suit was filed. Nevertheless it is included in the evidence bearing on the injunctive issue since it is evidence of Hilltop's present intention to comply with the Fair Housing Act.

In the remaining eight instances, between 1976 and 1979, homeowners bought homes from agents whose conduct was not put at issue by plaintiffs evidence. All eight instances showed no racial steering and are considered in the totality of the evidence. White homebuyers Deborah Bruhn and Terrence Smith were serviced by Marie McManus and LaDonna Herschelman, respectively. They both asked to see and were shown Cleveland Heights and South Euclid and both bought in Cleveland Heights. White homebuyer Estelle Painter bought in Cleveland Heights. Agent Rhoda Burger showed her homes there pursuant to her request. White homebuyer Connie Dustman requested that Bobbi Tortorici show her Cleveland Heights homes, one of which she bought. White home-

---

6. Unlike Ms. Harris who had no predisposition for a particular community, Mr. Mascareno asked Ms. Gardner to show him homes in Richmond Heights, South Euclid and Lyndhurst. In early 1977 he bought a home in South Euclid shown by agent Gardner. Agent Gardner's treatment of hispanic Mr. Mascareno was the same as her treatment of black and white prospective homeowners.

buyer David Grieshammer specifically requested an integrated neighborhood. Agent Sherrill showed and sold him a house in Cleveland Heights. Agent Edith Goodman concentrated her search on Shaker and Cleveland Heights for white homebuyer Carter Strang even though he also requested the less integrated South Euclid. He bought in Cleveland Heights. Black homeowner Rosa Peterson was shown homes in Cleveland Heights by Edith Drazin as requested. She bought there. Black homeowner Daniel Brinson was sold a home in Bedford Heights in 1976 and a home in predominantly white Solon in 1979. Both homes were sold to him by agent Esther Congress. In both instances he requested those areas. In sum, steering was not shown in any of the instances described by defendants' homeowner witnesses.

E.

The United States refers to incidents in which this court had found that "there was no racial steering involving Cleveland Heights." The United States argues that "[s]ince most of these incidents were contemporaneous with the incidents on which the Court based its findings of a 'continuing violation' by Hilltop, we do not believe that they support the conclusion that Hilltop is unlikely to violate the law in the future." In its reconsideration of the injunctive relief issue the court has not stopped with a review of the eight steering violations which affected Cleveland Heights. It has also considered five other steering incidents committed by agents Mayfield, Lee, Francis, and Strithof. But that is not the total Hilltop picture revealed in the evidence. Hilltop had 150 agents in 1978 and 160 to 165 in 1979. In attempting to predict the future conduct of a corporation consisting of that many agents, it is deemed relevant to consider not

only the acts of steering but the non-steering acts of all agents whose activities are reported in the record. A predictive factor is that in the years 1976 through 1978, as shown in the chart, *supra* at 12-13 [A13-A14], 14 agents engaged in 19 incidents in which no acts of steering were committed. Further, in assessing the future conduct of the corporation, it is relevant to consider the acts of agents in dealing with defendants' homeowner witnesses, in which no steering occurred. These acts of non-steering involved ten agents not the subject of plaintiffs' evidence, and agents Mayfield, Lee and Gardner, whose conduct has been individually evaluated in part II D.

Considering the acts of all these Hilltop agents, it is concluded that the plaintiffs have not proved that Hilltop is likely to continue steering violations of the Fair Housing Act in the future. Since the solicitation violation found to have been committed by agent Johanns is the only solicitation violation found to have been committed by a Hilltop agent, it is also concluded that the plaintiffs have not shown that Hilltop is likely to repeat solicitation violations in the future.

Upon the reasons and grounds stated, and after due reconsideration, the court reaffirms its conclusion that the plaintiffs have not established a basis upon which this court should at this time grant injunctive relief.[7]

---

7. A factor which the court considered in originally denying the request for injunctive relief was the closing of the Heights office for economic reasons and the drop in Hilltop's market share of Cleveland Heights real estate from 12 percent in 1978-79 to 3 1/2 percent in 1982. An affidavit of a Cleveland Heights statistical analyst, Ms. Mervine, states that her analysis shows that Hilltop Realtors "sold approximately nine percent (9%) of the owner-occupied homes sold in Cleveland Hights" during 1982. No explanation is made why plaintiffs did not

(Continued on following page)

III.

The United States argues that "a mere declaration of law, as applied to Hilltop's conduct here, will provide the defendant with little more than a reminder of what it knew or should have known when it commenced its intentional violations as found by this court." It therefore argues that "[s]uch a remedy is inadequate under these circumstances." Entitlement to injunctive relief depends not on the alleged inadequacy of a remedy of declaratory judgment, but rather upon a finding "that there exists some cognizable danger of recurrent violations." *United States v. Warwick Mobile Homes Estates*, 558 F.2d at 197. One important aspect of declaratory relief, here relevant, should not be ignored. 28 U.S.C. § 2202 provides:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice in hearing, against any adverse party whose rights have been determined by such judgment.

Edward B. Marks M. Corp. v. Charles K. Harris M. P. Co., 255 F.2d 518 (2nd Cir. 1958), gives this section its full force. Referring to section 2202's language, the court stated:

> We take this to mean that the further relief sought—here monetary recompense—need not have been demanded, or even proved, in the original action for declaratory relief. The section authorized further or new relief based on the declaratory judgment, and

---

Footnote continued—

attempt to call this witness at the 1983 trial to rebut the 3 1/2 percent estimate of Hilltop's market share in 1982. For this reason and because the court has reconsidered the plaintiffs' request for injunctive relief without regard to Hilltop's present market share of the Cleveland Heights real estate market, the court does not receive the affidavit into evidence.

any additional facts which might be necessary to support such relief can be proved on the hearing provided in the section or in an ancillary proceeding if that is necessary. *Accord, see Alcoa Steamship Co. v. Velez,* 285 F.Supp. 123, 124 (D.C. Puerto Rico 1968); *Shumaker v. Utex Exploration Co.,* 157 F.Supp. 68, 77 (D.C. Utah 1957).

In its opinion, at 206, this court cited *United States v. Hunter,* 459 F.2d 205 (4th Cir. 1972), and in note 110 called attention to note 19 of *Hunter* as it bore on the applicability of declaratory relief in a fair housing case. Additionally, note 19 indicates that section 2202 was available in that case in the future:

> Furthermore, after the entry of a declaratory judgment, 28 U.S.C. § 2202 allows the application for additional relief (including coercive relief) based upon the declarations previously made.

Should the defendants engage in further conduct which constitutes a violation of the Fair Housing Act and the plaintiffs file a supplemental claim to that effect, this court, pursuant to section 2202, is obliged to entertain and determine whether that has occurred. If established, there would then be a predicate for injunctive relief. Should the defendants hereafter commit one or more Fair Housing Act violations, Hilltop would have established, by its own deeds, that it does not intend "to abandon its discriminatory activities or . . . in any way revise its procedures to assure that they will not recur." (Brief of United States at p. 11.)

Upon the entire record, the motion of plaintiffs to alter or amend this court's judgment of December 7, 1983 is denied.[8]

IT IS SO ORDERED.

/s/ WILLIAM K. THOMAS
U.S. District Senior Judge

---

8. In its reply brief, the City states that it "would welcome a hearing at which Ms. Mervine and other witnesses could present evidence of the proper relief to be fashioned." Mr. Friedman's argument for affirmative relief in his summation was interrupted by the court, stating:

> I would suggest that we deal with liability. If I should arrive at a decision favorable to the Plaintiffs, there will be time enough to talk about what types of relief would be considered.

However, since the court ultimately determined that declaratory but not injunctive relief was appropriate any need to "talk" about the "types of relief", i.e. prohibitory injunctive relief alone or that coupled with mandatory (affirmative) relief, was mooted. Moreover, to rule on plaintiffs' Rule 59(e) motion an evidentiary hearing was unnecessary.